

No. 10759

United States *Vol*
Circuit Court of Appeals
For the Ninth Circuit. *2373*
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CHIQUITA MINING COMPANY, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.
—

Transcript of the Record
—

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

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No. 10759

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Circuit Court of Appeals
For the Ninth Circuit.

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Respondent.

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of the United States

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES:

For Taxpayer:

MARK J. SANDRICH, C. P. A.
KENNETH W. KEARNEY, ESQ.,
A. P. G. STEFFES, ESQ.

For Comm'r:

E. A. TONJES, ESQ.,
R. C. WHITLEY, ESQ.

Docket No. 108263

CHIQUITA MINING COMPANY, LTD.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1941

July 29—Petition received and filed. (1) Telegram. (Fee not paid).

Aug. 19—Fee paid (check).

Aug. 19—Request for hearing in Los Angeles filed by taxpayer.

8-19-41 Copy served.

Aug. 19—Amended petition filed. 8-19-41 Copy served.

Sept. 25—Answer filed by General Counsel.

1941.

Sept. 29—Notice issued placing proceeding on Los Angeles calendar.

Service of answer made.

1942

Aug. 26—Hearing set Oct 12, 1942, Los Angeles.

Oct. 14—Hearing had before Mr. Arundell on the merits. Submitted.

15—(Entry of appearance of A.P.G. Steffes pending admission to practice filed).

Application for subpoena of Hugh Wilton and James Maxfield filed. Briefs due simultaneous Nov. 14, 1942. 10-14-42 Subpoenas (2) issued and served.

Nov. 7—Transcript of hearing 10-14-42 filed.

Nov. 7—Transcript of hearing 10-15-42 filed.

Nov. 12—Memorandum filed by General Counsel.
Served 11-16-42.

Nov. 16—Brief filed by taxpayer.

Nov. 16—Notice of appearance of Kenneth W. Kearney as associate counsel filed.

Nov. 16—Copy of brief served on General Counsel.
1943

Jan. 5—Memorandum opinion rendered, Arundell, Judge, Div. 7. Decision will be entered under Rule 50. 1-6-43 Copy served.

Feb. 4—Motion to re-open cause for the presentation of further evidence filed by taxpayer. (Affidavit attached). 2-6-43 Denied.

Mar. 3—Computation of deficiency filed by General Counsel.

1943

Mar. 5—Hearing set April 7, 1943 on settlement.

Apr. 7—Hearing had before Judge Murdock on settlement under Rule 50. Respondent's computation not contested. Referred to Judge Arundell for decision.

Apr. 8—Decision entered, Arundell, Judge, Div. 7.

July 6—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

July 27—Proof of service filed by taxpayer. [1*]

Aug. 16—Motion for extension to file praecipe and to lodge statement of evidence to Sept. 15, 1943 and to transmit the record to Oct. 15, 1943 filed by taxpayer.

Sept. 20—Certified copy of order from the 9th Circuit extending the time to Nov. 1, 1943 to file the designation of record and to lodge the statement of evidence, and within which to complete and transmit the record filed.

Nov. 3—Certified copy of order from the 9th Circuit extending the time to Dec. 15, 1943 to file the designation of record and to lodge the statement of evidence and within which to complete and transmit the record filed.

Dec. 9—Certified copy of an order from 9th Circuit enlarging time to Jan. 15, 1944 to prepare and transmit the record filed.

*Page numbering appearing at top of page of original certified Transcript of Record.

1944

- Jan. 4—Notice of appearance of A. P. G. Steffes as counsel filed.
- Jan. 24—Certified copy of an order from 9th Circuit extending the time to 2-15-44 to file designation of record and to lodge statement of evidence filed.
- Feb. 21—Certified copy of an order from 9th Circuit extending the time to 3-25-44 to file designation of record and to lodge statement of evidence filed.
- Mar. 28—Certified copy of an order from 9th Circuit extending time to 5-1-44 to prepare and transmit the record filed.
- Apr. 13—Statement of evidence filed by taxpayer and agreed to.
- Apr. 13—Designation of record filed by taxpayer and agreed to. [2]

United States Board of Tax Appeals

Docket No. 108263

CHIQUITA MINING COMPANY, LTD.,

Petitioner,

v.

THE COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION (amended)

The above-named petitioner hereby petitions for

a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency LA:IT:90D:PB dated May 1, 1941, and as a basis of its proceeding alleges as follows:

1. The petitioner is a corporation, organized and existing under the laws of the State of Nevada, with principal office at Goodsprings, Nevada. The returns for the period here involved were filed with the collector for the State of Nevada.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner under date of May 1, 1941.

3. The taxes in controversy are income and excess profits taxes for the calendar years 1936, 1937, 1938 and 1939 and in the total amount of Eleven Thousand, Eight Hundred Sixty-one Dollars and Sixty-five Cents (\$11,861.65).

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

Commissioner erred in his computation of cost of mining property upon which depletion is allowable.

Commissioner erred in his estimate of the useful life of machinery and equipment, upon which depreciation deduction is based.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

A. Commissioner allowed as the total cost of mining property and development, for the purpose of establishing a depletion rate, the total amount of One Hundred Thousand Four Hundred Four Dol-

lars and Fifty-two Cents (\$100,404.52) consisting of an amount allowed by Commissioner as cost of the property, Seventeen Thousand Six Hundred Ninety Dollars (\$17,690.00) plus the amount expended as capitalized cost of development expense to July 27, 1936, Eighty-two Thousand Seven [3] Hundred Fourteen Dollars and Fifty-two Cents (\$82,714.52) which would produce, upon the estimated total developed and probable ore in the property as at July 27, 1936, amounting to One Hundred Fifty Thousand (150,000) tons, a cost per ton of Sixty-six and Ninety-four hundredths cents (\$.6694) per ton, which alleged cost per ton Commissioner used as a cost depletion rate per ton.

B. Commissioner disallowed as part of the cost of the mining property, the sum of Five Hundred Thousand Dollars (\$500,000.00), said sum being the total par value, at one Dollar (\$1.00) per share, of Five Hundred Thousand (500,000) shares of Petitioner's capital stock issued in exchange for part of said property, said disallowance being made under Commissioner's erroneous assumption that all of said stock was issued to the vendors of said part of said property, Jack H. Smith and Otto F. Schwartz, and that by virtue of said issuance of said stock, the vendors of said part of said property were, immediately after such issuance of said stock, just as much in control of Petitioner's affairs as they had been in control of said part of said property prior to the transfer by said vendors of said part of said property to Petitioner.

C. Petitioner did not issue Five Hundred Thousand (500,000) shares of its stock to the vendors mentioned under subparagraph B in exchange for mining property.

D. In connection with the acquisition, by Petitioner, of mining properties, agreements were entered into between Petitioner, Chiquita Mine Syndicate, Jack H. Smith and Otto F. Schwartz under the terms of which Petitioner was to acquire, from said Jack H. Smith and Otto F. Schwartz, certain mining claims, as follows:

Gold Trail

Gold Trail Extension

Hilltop

Fritz

Gold Bank

Gold Bank #1

Eagle

Hawk

Canary

Sparrow

Quail

Dove

together with a bond and lease on Chiquita mining claim and Hillside mining claim, in consideration for which [4] acquisition, Petitioner was to issue Two Hundred Fifty Thousand (250,000) shares of its authorized capital stock to said Jack H. Smith and Otto F. Schwartz, and Two Hundred Fifty Thousand (250,000) shares of its authorized capital stock to said Chiquita Mine Syndicate, totalling

Five Hundred Thousand (500,000) shares, said stock to be deposited in escrow, and to be released from said escrow at the rate of one (1) share of said stock to Chiquita Mine Syndicate for each two (2) shares of authorized but unissued capital stock which said Chiquita Mine Syndicate should purchase from Petitioner until such time as said Chiquita Mine Syndicate should have purchased Two Hundred Fifty Thousand (250,000) of said authorized but unissued capital stock from Petitioner, after which time there should also be released to said Jack H. Smith and Otto F. Schwartz one (1) share of said stock for each two (2) shares of said authorized but unissued capital stock which said Chiquita Mine Syndicate should purchase from Petitioner. Said Jack H. Smith and Otto F. Schwartz further agreed to sell their stock exclusively through said Chiquita Mine Syndicate until such time as said Chiquita Mine Syndicate should have purchased from Petitioner all its authorized but unissued capital stock, viz. Five Hundred Thousand (500,000) shares, at which time the said escrow was to terminate.

E. The terms of the agreement set forth under sub-paragraph D hereof were substantially complied with, and at no time after the acquisition, by Petitioner, of the mining claims set forth under sub-paragraph D hereof, were the vendors thereof, said Jack H. Smith and Otto F. Schwartz, as much in control of Petitioner's affairs as they had been in control of the claims and bond and lease prior to said acquisition.

F. Due to the fact that at no time after the acquisition, by Petitioner, of property set forth under sub-paragraph D hereof, and the issuance, by Petitioner, of Two Hundred Fifty Thousand (250,000) shares of its capital stock to vendors of said property, Jack H. Smith and Otto F. Schwartz and Two Hundred Fifty Thousand (250,000) shares of its capital stock to Chiquita Mine Syndicate, were the said vendors, Jack H. Smith and Otto F. Schwartz in as much control of Petitioner's affairs as they had been in control of the claims and bond and lease prior to said acquisition of property and issuance of capital stock, the transactions in connection therewith do not constitute a non-taxable transfer, and the cost to Petitioner is not necessarily the same as the cost in the hands of [5] the vendors, Jack H. Smith and Otto F. Schwartz.

G. The cost to Petitioner of the property as set forth under sub-paragraph D amounted to not less than One Hundred Thousand Dollars (\$100,000.00).

H. The basis upon which the per ton rate of allowance for depletion should be computed is the sum of the cost to Petitioner of the property set forth under sub-paragraph D, One Hundred Thousand Dollars (\$100,000.00), plus the cost to Petitioner of development expense to July 27, 1936, Eighty-two Thousand Seven Hundred Fourteen Dollars and Fifty-two Cents, \$82,714.52.) totalling the sum of One Hundred Eighty-two Thousand, Seven Hundred Fourteen Dollars and Fifty-two Cents (\$182,714.52).

I. The per ton rate of depletion allowance should equal the result of dividing the basis set forth under sub-paragraph H, One Hundred Eighty-two Thousand Seven Hundred Fourteen Dollars and Fifty-two Cents (\$182,714.52) by the number of tons of estimated total developed and probable ore in the property as at July 27, 1936, One Hundred Fifty Thousand (150,000) tons, or the amount of One Dollar Twenty-one and Eighty-one hundredths Cents (\$1.2181) per ton.

J. Commissioner disallowed the use by Petitioner of a depreciation rate of twenty percent (20%) per year on the cost of machinery and equipment, and substituted therefor a depreciation rate of ten percent (10%) per year.

K. A depreciation allowance on machinery and equipment is intended to enable a taxpayer to recover the cost of said machinery and equipment over its useful life. Depreciation actually sustained by Petitioner on its machinery and equipment has equalled an amount equal to not less than twenty percent (20%) per year of the cost thereof.

Wherefore, the Petitioner prays that this Board may hear the proceeding and redetermine the alleged deficiency in Petitioner's Income and Excess Profits Taxes for the calendar years 1936, 1937, 1938 and 1939.

MARK J. SANDRICH, C.P.A.

Counsel for Petitioner

257 South Spring Street

Los Angeles, California [6]

State of Nevada,
County of Clark—ss.

James J. Smith, being duly sworn, says that he is the President of Petitioner corporation, and that he is duly authorized, as President thereof, to sign the foregoing Petition; that he has read the foregoing Petition, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

JAMES J. SMITH,
President, Chiquita Mining
Company, Ltd.

Subscribed and sworn to before me this 14th day of August, 1941.

[Seal] A. MUNZEBROCK,
Notary Public in and for the County of Clark, State
of Nevada.

My Commission Expires March 4, 1945. [7]

EXHIBIT A

May 1, 1941

LA:IT:90D:PB

Chiquita Mining Company, Ltd.,
Goodsprings, Nevada.

Sirs:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1936 and December 31, 1938 discloses a deficiency of \$9,084.99 and that the determina-

tion of your excess-profits tax liability for the taxable year ended December 31, 1938 discloses a deficiency of \$3,266.97 and that the determination of your income tax liability for the taxable year ended December 31, 1937 discloses an over-assessment of \$490.31 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the

form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner.

By

(Signed) GEORGE D. MARTIN

Internal Revenue Agent in

Charge.

Enclosures:

Statement.

Form of Waiver and acceptance.

Form 843.

PB:EES [8]

STATEMENT

LA:IT:90D:PB

Chiquita Mining Company, Ltd.,
Goodsprings, Nevada

Tax Liability for the Taxable Years Ended

December 31, 1936,

December 31, 1937

and

December 31, 1938

Year	Liability	Assessed Income Tax	Overassessment	Deficiency
1936	\$ 7,946.25	\$ 4,160.41	\$	\$ 3,785.84
1937	9.17	499.48	490.31	
1938	11,130.47	5,831.32		5,299.15
Totals	\$19,085.89	\$10,491.21	\$ 490.31	\$ 9,084.99
Excess-profits Tax				
1938	\$ 3,727.01	\$ 460.04	\$	\$ 3,266.97

In making this determination of your income and excess-profits tax liability, careful consideration has

been given to the reports of examination dated October 30, 1940 and April 1, 1941, and to your protest dated December 18, 1940.

The contention made in your protest that the determination of allowable depreciation on machinery and equipment should be based upon an estimated life of 5 years is denied, inasmuch as it is considered that the useful life of such assets in your business is 10 years. The disallowance of depreciation herein is based upon the determination of allowable depreciation on machinery and equipment at the rate of 10% per annum on the costs claimed, an allowance for one-half year being made with respect to additions to the asset during the respective years.

The contention made in your protest that percentage depletion is allowable as claimed in your amended returns for the years 1936 and 1937 and in your return for the year 1938 is denied because in your first return filed in respect of the property you did not state [9] whether you elected to have the depletion allowance for the property for the taxable year for which the return was made computed with or without regard to percentage depletion. Section 114(b)(4), Revenue Acts of 1936 and 1938. Depletion based upon cost is herein allowed under the provisions of section 23(m), Revenue Acts of 1936 and 1938.

The overassessment shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district,

and will be applied by that official in accordance with section 322, Revenue Act of 1936, provided that you fully protect yourself against the running of the statute of limitations with respect to the apparent overassessment referred to in this letter, by filing with the collector of internal revenue for your district, a claim for refund on form 843, a copy of which is enclosed, the basis of which may be as set forth herein.

A copy of this letter and statement has been mailed to your representative, Mr. Mark J. Sandrich, 257 South Spring Street, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1936

Net income as disclosed by return.....	\$	0.00
Additional income and unallowable deductions:		
(a) Net income reported in amended return	\$16,698.10	
(b) Excessive depreciation claimed in amended return	2,999.02	
(c) Adjustment of depletion claimed in amended return	8,651.90	28,349.02
Total		\$28,349.02
Additional deduction:		
(d) Understatement of capital stock tax accrual in amended return		29.00
Net income adjusted	\$28,320.02	

[10]

Explanation of Adjustments

(a) Your original return reported net income as "None". The net income reported in your amended return is accepted as the correct net income subject to adjustments (b), (c) and (d).

(b) Upon the basis previously stated excessive depreciation on machinery and equipment claimed in your amended return is disallowed in the amount of \$2,999.02.

(c) For the reason previously stated percentage depletion claimed in your amended return in the amount of \$16,100.84 is disallowed. Cost depletion sustained is allowed at the rate of \$0.6694 per ton for 11,127.78 tons of ore produced, or \$7,448.94. These adjustments result in a disallowance of the net amount of \$8,651.90.

(d) The amount of capital stock tax accrued during the taxable year is \$1,029.00, whereas the deduction claimed in your amended return is \$1,000.00.

COMPUTATION OF TAX

Taxable Year Ended December 31, 1936

INCOME TAX

Normal Tax

Taxable net income	\$28,320.02
Normal-tax net income	\$28,320.02

Normal tax:

8% of \$ 2,000.00.....	\$ 160.00
11% of 13,000.00.....	1,430.00
13% of 13,320.02.....	1,731.60

Total normal tax	\$ 3,321.60
------------------------	-------------

Surtax on Undistributed Profits

Taxable net income	\$28,320.02
Less: Normal tax	3,321.60

Adjusted net income	\$24,998.42
Undistributed net income	\$24,998.42

Surtax:

7% of \$5,000.00.....	\$ 350.00
12% of 2,499.84.....	299.98
17% of 4,999.68.....	849.95
22% of 4,999.68.....	1,099.93
27% of 7,499.22.....	2,024.79

Total surtax	\$ 4,624.65
Total normal tax	3,321.60

Total income tax (normal tax and surtax).....	\$ 7,946.25
---	-------------

Income tax assessed (normal tax and surtax):

Original, account No. 85069.....\$ None

Amended return, account No. Feb.

40000 (1939) 4,160.41

Total assessed	4,160.41
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Deficiency of income tax.....	\$ 3,785.84
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[12]

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1937

Net income as disclosed by return.....	\$ 0.00
--	---------

Additional income and unallowable deductions:

(a) Net income reported in amended return	\$ 3,222.72	
(b) Excessive depreciation claimed in amended return	10,493.67	
(c) Overstatement of capital stock tax accrued in amended return.....	750.00	
(d) Deduction of penalty in amended return disallowed	148.50	14,614.89

Total	\$14,614.89
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Additional deduction:

(e) Adjustment of depletion claimed in amended return	14,551.39
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Net income adjusted	\$ 63.50
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Explanation of Adjustments

(a) Your original return reported net income as "None". The net income reported in your amended return is accepted as the correct net income subject to adjustments (b), (c), (d) and (e).

(b) Upon the basis previously stated excessive depreciation on machinery and equipment claimed in your amended return is disallowed in the amount of \$10,493.67.

(c) The amount of capital stock tax accrued during the taxable year is \$250.00, whereas the deduction claimed in your amended return is \$1,000.00.

(d) The deduction of \$148.50 claimed in your amended return for penalty incurred due to delinquency in filing capital stock tax return is not allowable: section 23(a), Revenue Act of 1936. [13]

(e) For the reason previously stated percentage depletion claimed in your amended return in the amount of \$3,441.15 is disallowed. Cost depletion sustained is allowed at the rate of \$0.6694 per ton for 26,878.61 tons of ore produced, or \$17,992.54. These adjustments result in an additional deduction in the net amount of \$14,551.39.

COMPUTATION TAX

Taxable Year Ended December 31, 1937

INCOME TAX

Normal Tax

Taxable net income	\$	63.50
Normal-tax net income	\$	63.50
Normal tax:		
8% of \$63.50	\$	5.08
Total normal tax	\$	5.08

Surtax on Undistributed Profits

Taxable net income	\$	63.50
Less: Normal tax		5.08
Adjusted net income	\$	58.42
Undistributed net income	\$	58.42

Surtax:

7% of \$58.42	\$	4.09
Total surtax	\$	4.09
Total normal tax		5.08

Total income tax (normal tax and surtax).....\$ 9.17

Income tax assessed (Normal tax and surtax):

Original, account No. 85561.....	\$	None
Amended return, account No. Feb.		
40001 (1939)		499.48

Total assessed | 499.48 |

Overassessment of income tax.....\$ 490.31

[14]

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1938

Net income as disclosed by return.....\$32,667.29

Unallowable deductions:

(a) Excessive depreciation	\$11,623.10	
(b) Adjustment of depletion	18,243.03	
(c) Penalty	25.00	29,891.13

Total\$62,558.42

Additional deduction:

(d) Capital stock tax 250.00

Net income adjusted\$62,308.42

Explanation of Adjustments

(a) Upon the basis previously stated excessive depreciation on machinery and equipment claimed in your return is disallowed in the amount of \$11,-623.10.

(b) For the reason previously stated percentage depletion claimed in your return in the amount of \$32,828.43 is disallowed. Cost depletion is allowed at the rate of \$0.6694 per ton for 21,788.76 tons of ore produced, or \$14,585.40. These adjustments result in a disallowance of the net amount of \$18,243.03.

(c) The deduction of \$25.00 claimed in your return for penalty incurred due to delinquency in filing capital stock tax return is not allowable; section 23(a), Revenue Act of 1938.

(d) The amount of capital stock tax accrued during the taxable year is \$500.00, whereas the deduction claimed in your return is \$250.00. [15]

COMPUTATION OF TAX

Taxable Year Ended December 31, 1938

EXCESS-PROFITS TAX

Taxable net income\$62,308.42

Less: 10% of \$250,000.00, value of capital stock as declared in your capital stock tax return for year ended June 30, 1938 25,000.00

Net income subject to excess-profits tax.....\$37,308.42

5% of declared value of capital stock..... 12,500.00

Balance\$24,808.42

Excess-profits tax:

6% of \$12,500.00.....\$ 750.00

12% of \$24,808.42..... 2,977.01

Correct excess-profits tax liability.....\$ 3,727.01

Excess-profits tax assessed:

Original, account No. 40236..... 460.04

Deficiency of excess-profits tax\$ 3,266.97

INCOME TAX

Taxable net income\$62,308.42

Less: Excess-profits tax 3,727.01

Adjusted net income\$58,581.41

Tentative tax at 19%\$11,130.47

Correct income tax liability\$11,130.47

Income tax assessed:

Original, account No. 40236..... 5,831.32

Deficiency of income tax\$ 5,299.15

[Stamped]: Amended Petition. Appeal Filed
7-29-41.

[Endorsed]: U.S.B.T.A. Filed Aug. 19, 1941.
[16]

[Title of Board and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income and excess-profits taxes for the calendar years 1936, 1937, and 1938; denies the remainder of the allegations contained in paragraph 3 of the petition.

4. Denies the allegations of error contained in paragraph 4 of the petition.

5. A. Admits that the Commissioner allowed as the total cost of mining property and development, for the purpose of determining a depletion rate, an amount of \$100,404.52 consisting [17] of an amount allowed as cost of the property in the amount of \$17,690.00, plus the amount expended as capitalized cost of development to June 27, 1936, in the amount of \$82,714.52. Admits that the Commissioner determined that the taxpayer may deduct depletion on the basis of \$.6694 per ton. Denies the remainder of the allegations contained in subparagraph A of paragraph 5 of the petition.

B to K, inclusive. Denies the allegations contained in subparagraphs B to K, inclusive, of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL,

FTH

Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

Alva C. Baird,

Division Counsel.

Frank T. Horner,

E. A. Tonjes,

Special Attorneys,

Bureau of Internal Revenue.

FAT/mm 9/18/41

[Endorsed]: U.S.B.T.A. Filed Sept. 25, 1941.

[18]

The Tax Court of the United States

[Title of Cause.]

Docket No. 108263

Depreciation of mining and milling machinery and equipment determined.

N. J. Sandrich, C.P.A.,

for the petitioner.

E. A. Tonjes, Esq.,

for the respondent.

MEMORANDUM OPINION

Arundell, Judge: Deficiencies in income taxes have been determined for the years 1936 and 1938 in the

respective amounts of \$3,785.84. \$5,299.15 and for the year 1938 there was also determined a deficiency in excess profits taxes in the sum of \$3,266.97. Two issues are raised by [19] the pleadings: (1) the proper allowance for depletion and (2) the allowable depreciation. No evidence was offered on the first issue and respondent's determination on this point is consequently approved.

The parties have agreed on the cost of the depreciable machinery and equipment here in dispute, leaving only the useful life of that property for determination. The respondent based his determination on a finding that the property had a 10-year life, while petitioner claims that the useful life was not more than five years.

Petitioner was organized under the laws of Nevada with its principal office at Goodsprings, Nevada and its returns for the taxable years were filed with the Collector for the State of Nevada.

It commenced the operation of its plant on a revenue producing basis in August 1936. Operations were continued until July 1941, at which time all operations ceased because of the disappearance of commercial ore that it would pay to mine and mill. The cost of mining and milling machinery up to the time when petitioner commenced operations in 1936 was \$101,703.30; additions in 1937 cost \$15,849.61; additions in 1938 cost \$6,424.06; and in 1939 there was expended in additions \$5,910.51, making a total cost of \$129,887.48. These amounts were agreed to by the parties.

A large part of the equipment here involved was bought as a unit from an old mining camp near Tonopah, Nevada. The plant so purchased was dismantled and moved to its present location, where after being overhauled and new parts used to replace old parts, where necessary, it was finally installed. The old mill had been set up and torn down many times before it was acquired by petitioner. It was petitioner's purpose to use the [20] mill so constructed as a test mill to determine the best method of treating the ore and it was not contemplated at the time of its erection that it could be used many years. The reason for this fact was that the ores initially being treated were an oxide and after their exhaustion the ores expected to be encountered were a sulphide, which ores required an entirely different process and mill for their treatment. None of the large or important items constituting the plant was new and the life of this machinery and equipment was not more than one-half that of new machinery and equipment. The cost of moving the old plant to its present location and reconditioning it was high and it turned out that it would have been more economical to have purchased much of the machinery new.

When the mine closed the general condition of the equipment was very poor, and one of the two ball mills had already been completely abandoned. The capacity of the mill was more than cut in two at this time and it would have cost from \$20,000 to \$25,000 to put it in operating condition, and even after this expenditure it would have been only about seventy

per cent efficient. When the mine closed there was no further use for the machinery and equipment and the salvage value of the plant at that time was approximately \$13,000. The milling and mining machinery was not of a type, nor of a capacity, that would be suitable for the mining and milling of the sulphide ore, which had then been encountered in its operations.

Considering the entire evidence, we are of the opinion that depreciation on the property involved should be allowed on the basis of a five-year life.

Decision will be entered under Rule 50.

Enter:

Entered Jan. 5, 1943. [21]

The Tax Court of the United States
Washington

Docket No. 108263

CHIQUITA MINING COMPANY, LTD.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the memorandum opinion of the Court entered herein on January 5, 1943, the respondent herein, on March 3, 1943, filed a recomputation for entry of decision under Rule 50. Hear-

ing was had thereon on April 7, 1943, at which time the recomputation filed by the respondent was not contested by the petitioner. Wherefore, it is

Ordered and Decided: That there are deficiencies in income tax for the years 1936 and 1938 in the respective amounts of \$2,131.29 and \$3,279.96 and that there is a deficiency in excess profits tax for the year 1938 in the amount of \$1,817.79.

Enter:

Entered April 8, 1943.

(Signed) C. R. ARUNDELL,
Judge. [22]

[Title of Tax Court and Cause.]

MOTION TO RE-OPEN CAUSE

Chiquita Mining Company, Ltd., a Nevada corporation, petitioner herein, moves this Honorable Court to reopen the cause heretofore tried on the 14th and 15th days of October, 1942 for the presentation of further evidence upon the issue of the allowance of a proper rate for depletion of the ores in the properties owned by petitioner;

Said motion is made in the interest of justice and will be made upon the ground that by reason of surprise, misfortune, and excusable neglect petitioner was prevented from being heard upon the issue above mentioned;

Said motion is based upon all the records and files herein, upon the transcript of proceedings be-

fore this Honorable Court and upon the affidavits of A.P.G. Steffes, Mark J. Sandrich and Benton N. Colver, served and filed herewith.

MARK J. SANDRICH, C.P.A.

Counsel for Petitioner,
257 S. Spring St.,
Los Angeles, California.

KENNETH W. KEARNEY,

215 W. Seventh St.,
Los Angeles, Calif.
Of Counsel. [23]

AFFIDAVIT

State of California

County of Los Angeles—ss.

A. P. G. Steffes, being first duly sworn, deposes and says:

That on the 14th day of October, 1942, by permission therefor duly given, affiant appeared as counsel for Chiquita Mining Company, Ltd., before the Board of Tax Appeals, and likewise appeared in the same matter on the 15th day of October, 1942, as is more particularly shown by the records of said hearing.

That immediately prior to and at the time of said hearing, affiant was ill as the result of overwork; that immediately after the conclusion of said hearing, affiant went to his home and suffered a physical and nervous collapse.

That the following Monday morning affiant attempted to carry on certain court work, but after doing so, suffered another collapse.

That affiant suffered a third collapse on Monday, October 26, 1942, and was confined to his bed during that entire week and until his removal to the United States Veteran's Hospital at Sawtelle, California, on Saturday, October 31, 1942.

That affiant remained in said hospital for a period of two weeks, leaving said hospital on Saturday, November 14, 1942.

That for some time thereafter affiant was unable to carry on any work as an attorney at law, or otherwise.

That affiant verily believes that because of his physical, mental and nervous condition immediately prior to and at the time [24] of the said hearing he was unable to properly prepare and present said matter in the manner in which he would have presented the same had he not been ill.

A. P. G. STEFFES.

Subscribed and sworn to before me this 1st day of February, 1943.

[Seal] OLGA L. RUPP,

Notary Public, Los Angeles County, State of California. [25]

State of California,
County of Los Angeles—ss.

Benton N. Colver, being duly sworn deposes and says that he is a physician and surgeon, duly licensed to practise as such in the State of California; that he has known Mr. A. P. G. Steffes for seven years; that on October 16, 1942, Mr. Steffes called upon affiant for treatment; that Mr. Steffes

was then suffering from acute exacerbation of chronic nasal infection and resulting nervous depletion, and was not in affiant's opinion able to transact any business nor handle the trial of a case in court; that it appeared to affiant that Mr. Steffes has been seriously ill for a considerable length of time; that affiant recommended the following treatment for Mr. Steffes: nasal treatments, phototherapy, controlled dietetic regime, and complete rest; that Mr. Steffes was under the treatment of affiant and other physicians for several weeks, a large part of the time being confined to a hospital, and has now, affiant is informed and believes, recovered sufficiently to return to business.

BENTON N. COLVER.

Subscribed and sworn to before me this 1st day of Feb., 1943.

MARY PATCH,

Notary Public in and for the County of Los Angeles, State of California. [26]

AFFIDAVIT

State of California

County of Los Angeles—ss.

Mark J. Sandrich, being first duly sworn, deposes and says: That he is a certified public accountant; that, as counsel for Chiquita Mining Company, Ltd., a Nevada corporation, he instituted in its behalf a petition before the United States Board of Tax

Appeals for redetermination of income tax liability, which petition was assigned Docket number 108263, and which came on for hearing in Los Angeles, California, on the 14th and 15th days of October, 1942, before the Honorable C. R. Arundell;

That affiant had arranged with one A. P. G. Steffes, who is general counsel for petitioner, a member of the bars of the States of California and Nevada, to associate himself as co-counsel in the matter, and to procure and produce, at the hearing, certain documentary evidence necessary to the successful presentation of the case; That said A. P. G. Steffes assured affiant that he was familiar with the transactions involved and that at the time for trial, he, the said A. P. G. Steffes, would appear, and would produce said documentary evidence; That the day before the trial, affiant spoke to the said A. P. G. Steffes and was under the impression that Mr. Steffes was ready to produce said documentary evidence;

That upon the opening of trial, it became evident to affiant that the said A. P. G. Steffes had not produced said documentary evidence, and, from affiants' conversation with Mr. [27] Steffes at that time, it became apparent that Mr. Steffes was unable, at that time, to so produce said documentary evidence; That said documentary evidence consisted of contracts and agreements, together with escrow papers and other instruments evidencing the acquisition, and manner thereof, of the mining claims acquired by petitioner, such acquisition, and man-

ner thereof, constituting the main point in the determination of whether or not the original owners of said mining claims were in control of the corporation immediately after such transfer of said mining claims to the Petitioner;

That affiant is advised, and believes, that petitioner herein has a valid and meritorious case upon the merits, with regard to the question of the allowance of a proper deduction for depletion of the ore in the Chiquita Mine;

That affiant relied upon A. P. G. Steffes to present evidence upon that issue before the Honorable Court and affiant did not know at the time of trial of this cause that Mr. Steffes was too ill to assist in the trial, or to transact any business.

That affiant believes that in the interests of justice this cause should be reopened in order that petitioner may have its day in court with regard to the issue involved and that if such rehearing is granted the evidence [28] will show that petitioner is entitled to a redetermination of the rate allowed it for depletion of the ore in the properties owned by petitioner.

MARK J. SANDRICH.

Subscribed and sworn to before me this 1st day of February, 1943.

MARY PATCH,

Notary Public in and for the County of Los Angeles, State of California.

[Stamped]: The Tax Court of the U. S. Denied Feb. 6, 1943. (Signed) C. R. Arundell, Judge.

[Endorsed]: T.C.U.S. Filed Feb. 4, 1943. [29]

[Title of Tax Court and Cause.]

PETITION FOR REVIEW BY THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

I.

JURISDICTION

Chiquita Mining Company, Ltd., your petitioner, respectfully petitions this Honorable Court to review the decision of the Tax Court of the United States, entered on April 8, 1943, and finding a deficiency in income tax due from your petitioner, for the years 1936 and 1938 in the respective amounts of \$2,131.29 and \$3,279.96; and finding a deficiency in excess profits tax due from your petitioner for the year 1938, in the amount of \$1,817.79.

Your petitioner is a corporation organized under the laws of the State of Nevada, having its principal office and place of business at Goodsprings, Nevada. [30]

The income tax and excess profits tax returns in respect of which the aforementioned tax liabilities arose were filed by your petitioner with the Collector of Internal Revenue for the District of Nevada, located in the City of Reno, State of Nevada, which is located within the jurisdiction of the Circuit Court of Appeals for the Ninth Judicial Circuit.

Jurisdiction in this court to review the decision

of the Tax Court of the United States aforesaid is founded on Sections 1001-3 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, 1101 of the Revenue Act of 1932, and 519 of the Revenue Act of 1934. (Sec. 1141-1142 I.R.C.)

II.

NATURE OF CONTROVERSY

Your petitioner was incorporated in 1932, and during the year for which the tax deficiencies were assessed, was engaged in the mining and production of gold in the Yellow Pine Mining District near Goodsprings, Nevada. Petitioner had an authorized capital stock of one million (1,000,000) shares, and having a par value of \$1.00.

In 1932, Petitioner acquired from Jack H. Smith and Otto F. Schwarz twelve (12) unpatented mining claims and a lease with option to purchase two (2) other mining claims. In consideration thereof petitioner issued 250,000 shares of its authorized capital stock to Jack H. Smith and Otto F. [31] Schwarz and 250,000 shares to Chiquita Mine Syndicate totaling 500,000 shares. The 250,000 shares issued to Chiquita Mine Syndicate were to be placed in escrow and released to Chiquita Mine Syndicate if, as and when there was purchased from the treasury of the corporation any or all of the remaining 500,000 shares. One (1) share of stock was to be released from escrow for each two (2) shares thus purchased from the treasury of the corporation.

None of the shares contained in the block of 250,000 shares issued to Chiquita Mine Syndicate, nor any shares contained in the block of 500,000 shares of treasury stock, were acquired by Jack H. Smith or Otto F. Schwarz, or either of them. Furthermore, Jack H. Smith and Otto F. Schwarz agreed to sell the 250,000 shares issued to them to Chiquita Mine Syndicate for the total price of \$87,500.00. This block of 250,000 shares originally issued to Jack H. Smith and Otto F. Schwarz was, over a period of time, actually purchased by Chiquita Mine Syndicate for the total consideration of \$87,500.00.

Consequently, at no time after the acquisition by petitioner of the mining claims mentioned above, were the vendors thereof, said Jack H. Smith and Otto F. Schwarz, as much in control of petitioners affairs as they had been in control of the claims prior to said acquisition.

In 1936, petitioner produced 11,127.78 tons of ore, [32] and in 1938, 21,788.76 tons.

The Commissioner allowed as the total cost of mining property and development, for the purpose of establishing a cost depletion rate, the total sum of \$100,404.52, consisting of an amount of \$17,690.00 allowed as cost of property, plus \$82,714.52 allowed as the amount expended as capitalized cost of development expense to July 27, 1936, which would produce, upon the estimated total developed and probable ore in the property as at July 27, 1936, amounting to 150,000 tons, a cost per ton of 66.94 cents (\$.6694) per ton, which alleged cost per

ton, the Commissioner used as a cost depletion rate per ton.

The Commissioner disallowed as part of the cost of the mining property, the sum of \$500,000, said sum being the total par value, at \$1.00 per share, of 500,000 shares of petitioner's capital stock issued in payment for part of said property. Said disallowance was made under the Commissioners erroneous assumption that all of said stock was issued to the vendors of said property, namely, Jack H. Smith and Otto F. Schwarz, and therefore, that immediately after the issuance of said stock and by reason thereof, the said vendors were just as much in control of petitioner's affairs and said mining property, as they had been prior to the acquisition of said property by petitioner.

Petitioner maintained that since at no time did Jack H. Smith and Otto F. Schwarz own more than one-half of the out- [33] standing shares of stock of petitioner, therefore, at no time were said vendors of said mining property in as much control of petitioner's affairs and said mining property as they had been in control of the mining property prior to its acquisition by petitioner.

Petitioner further contended that the cost to petitioner was and is not necessarily the same as the cost in the hands of said vendors, but that the cost to petitioner of said property amounted to not less than \$100,000.00.

Based upon the foregoing, petitioner contended that the basis upon which the per ton rate of allow-

ance for cost depletion should be computed, is the sum of \$500,000.00 or in any event, \$100,000.00, plus the cost to petitioner of development expense amounting to \$82,714.52, totaling the sum of \$182,714.52. Reasoning further, petitioner contended that the proper per ton rate of depletion allowance should equal the result of dividing the said sum of \$182,714.52 by 150,000 (the number of tons of estimated total developed and probable ore in the property as at July 27, 1936) or the resulting amount of \$1.2181 per ton.

Had the latter rate per ton of cost depletion been allowed, the following changes in assessments would have resulted: [34]

	Assessed by Commissioner	Proper Assessment
1936 Income Tax	\$2,131.29	\$ 142.39
1938 Income Tax	3,279.96	1,281.02
1938 Excess Profits Tax	1,817.79	383.14
	<hr/>	<hr/>
Total	\$7,229.04	\$1,806.55

In the proceedings before The Tax Court of the United States, two issues were raised by the pleadings: (1) the proper allowance for depletion and (2) the allowable depreciation.

The Tax Court of the United States held: (1) That no evidence was offered on the first issue and the Commissioner's determination on this point was approved.

(2) That, as contended by petitioner, depreciation on the personal property involved should be allowed on the basis of a five-year life as claimed

by petitioner, instead of a ten-year life as determined by the Commissioner.

* * * * *

Since the decision of the Tax Court of the United States on the depreciation issue was not adverse to the contention of petitioner, this Petition for Review is not directed to the decision on that issue. For the same reason, no facts are recited herein, bearing upon that issue.

As is more particularly set forth hereinafter, under "Assignments of Error", the Tax Court of the United States denied petitioner application for a continuance, made certain rulings with regard to the introduction of evidence, and denied petitioner's motion to re-open the cause, for the presentation [35] of further evidence upon the depletion issue.

* * * * *

III.

ASSIGNMENT OF ERRORS

In making its decision as aforesaid, The Tax Court of the United States committed the following errors upon which your petitioner relies as the basis of this proceeding:

(1) The Court erred in denying petitioner's motion for a continuance when the cause was first called on the calendar on October 12, 1942.

(2) The Court erred in holding that evidence was immaterial, to the effect that on two prior occasions the Internal Revenue Department had held that the cost to petitioner of the mining property in ques-

tion was \$500,000.00, and that upon each of said occasions, petitioner paid an additional tax based on such determination.

(3) The Court erred in denying petitioner's motion for a continuance after the refusal of James Maxfield and Hugh Wilton to testify (Mr. Maxfield being the Chiquita Mine Syndicate).

(4) Counsel for the Commissioner having agreed to the introduction of secondary evidence in lieu of certain written documents, the Court erred:

(a) In restricting the proof to such written documents;

(b) In rejecting the secondary evidence of the attorney for petitioner, concerning the consideration for said mining [36] property paid, by petitioner, and that portion of said consideration which was received by the vendors, Jack H. Smith and Otto F. Schwarz, upon the question as to whether said vendors were at any time as much in control of petitioner's affairs as they had been prior to the acquisition of said property by petitioner.

(c) In rejecting the secondary evidence of Mark J. Sandrich, C.P.A. on the same subject.

(d) In rejecting the books and records of petitioner in the possession of said Mark J. Sandrich, C.P.A. on the same subject.

(5) The Court erred in rejecting evidence on the question as to whether the Commissioner was estopped to deny the cost to petitioner of said mining claims to be \$500,000 by reason of two previous determinations to that effect by the Internal Revenue Department.

(6) The Court erred in denying petitioner's motion to reopen this cause for the presentation of further evidence upon the issue of the allowance of a proper rate for depletion of the ores in the properties owned by the petitioner.

(The evidence referred to in Assignments 4a-b-c-d and 5, *supra*, is too voluminous to quote in full as part of said Assignments of Error, but will appear in full in the statement of evidence to be filed herein.)

Wherefore, your petitioner prays that this Honorable [37] Court may review the decision and order of The Tax Court of the United States with reference to the proper allowance for depletion, and reverse and set aside the same, and direct The Tax Court of the United States to cause a rehearing and further hearing to be had on said question relating to the proper allowance for depletion; and for the entry of such further orders and directions as shall by this Court be deemed meet and proper, in accordance with law.

MARK J. SANDRICH, C.P.A.

Counsel for the Petitioner

A. P. G. STEFFES

Attorneys for Petitioner

257 So. Spring Street

Los Angeles, California.

State of California

County of Los Angeles—ss.

A. P. G. Steffes, being duly sworn, says:

I am one of the attorneys for the petitioner in this

proceeding; I prepared the foregoing petition and am familiar with the contents thereof. The allegations of fact contained therein are true to the best of my knowledge, information, and belief. The petition is not filed for the purpose of delay, and I believe the petitioner is justly entitled to the relief sought.

A. P. G. STEFFES

Subscribed and sworn to before me this 2nd day of July, 1943.

HENRY W. SHAW

Notary Public in and for said
County and State.

[Endorsed]: T.C.U.S. Filed July 6, 1943. [38]

[Title of Tax Court and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To: Commissioner of Internal Revenue,
Internal Revenue Building,
Washington, D. C.

J. P. Wenchel, Attorney for Respondent,
Chief Counsel,
Internal Revenue Building,
Washington, D. C.

You Are Hereby Notified that on the 6th day of July, 1943, a petition for review by the United States Circuit Court of Appeals for the Ninth Cir-

cuit of the decision of The Tax Court of The United States heretofore rendered in the above entitled cause, was filed with the Clerk of said Court.

A copy of the petition as filed is attached hereto and served upon you.

Dated: July 20, 1943.

MARK J. SANDRICH, CPA

Counsel for Petitioner

A. P. G. STEFFES

Attorney for Petitioner

257 South Spring Street,

Los Angeles, California.

Service of the foregoing notice of filing and of a copy of the petition for review is hereby acknowledged this 26th day of July, 1943.

J. P. WENCHEL SLY.

Chief Counsel

Bureau of Internal Revenue

Attorney for Respondent.

[Endorsed]: T.C.U.S. Filed July 27, 1943. [39]

[Title of Tax Court and Cause.]

STATEMENT OF EVIDENCE

The above-entitled proceeding came on for hearing on the 12th day of October, 1942, before the Honorable C. E. Arundell, Judge of The Tax Court of the United States, at Los Angeles, California, pursuant to notice of hearing theretofore given.

Mark J. Sandrich, Esq., appeared on behalf of Petitioner; and E. A. Tonjes, Esq., for the Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, appeared on behalf of the Commissioner of Internal Revenue, Respondent.

Thereupon the following proceedings were had, and testimony heard, to wit: [40]

PROCEEDINGS

The Clerk: 108263, Chiquita Mining Company, Ltd.

Mr. Sandrich: Mark J. Sandrich for the petitioner.

There are some complications that have arisen here, in that my first witness, my most important witness, who is the majority stockholder and whose affairs are under bankruptcy in 77(b), and he is so involved in some other proceeding directly connected with ownership of the mine that he has been advised by his attorney that he cannot testify in this case, or, rather, that he should not, for his own reasons.

The trustee in bankruptcy, who has control of this stock is, of course, under direction of Judge Brink, and Judge Brink is not in town. Therefore, the trustee is not able to get any instructions. There are also some other matters pending there regarding the ending of the bankruptcy proceeding, and the whole affair seems to be up in the air at this time.

This witness' testimony will be of great importance.

Mr. William Rains: My name is William Rains, if the Court please, and I represent the trustee. I heard nothing of this matter until late last Friday night. I talked to the trustee, and he doesn't know whether as trustee under the bankruptcy proceedings—and, incidentally he now holds 51 per cent of the issued and outstanding stock of the petitioning corporation; and, incidentally, there was a Chapter 11 proceeding preceding the bankruptcy, in which he held title to the same amount of stock—he doesn't know whether or not in the year and a half, more or less, through either of those proceedings, either the bankruptcy, and I should have said Chapter 10 instead of Chapter 11, he may have incurred a tax liability or may not have. I doubt that he has, but there is a [41] possibility. I don't know what his position should be here, and as Mr. Sandrich has stated, the situation is confusing to the trustee and his counsel.

We have effected virtually a compromise of the entire composition of the bankruptcy proceedings, and it is a matter of days, not more than a very few weeks, before all of this stock will be turned back to the individuals and to the debtor corporation, there being sufficient cash to satisfy the Referee in Bankruptcy for creditors, and we have devised a mechanism, we hope, for the payment of counsel fees and administration expenses over and above this particular stock, which will not be invaded at all.

We would like very much, from the trustee's standpoint—we have no interest whatsoever other-

wise—to let the matter go back to the individuals and to the debtor corporation before the trustee is called upon to do anything in connection with this matter.

The Judge: Whose proceedings are in bankruptcy,—this company's?

Mr. Rains: This company's. 51 per cent of the stock of this company is owned by the trustee in bankruptcy, but all of that stock will be turned back to the individuals, who are bankrupt.

Mr. Tonjes: To the bankrupt corporation?

Mr. Rains: To the bankrupt corporation.

The Judge: Is this corporation I have before me in those proceedings?

Mr. Rains: It is not in the proceedings, not the corporation as such, no, your Honor.

Mr. A. P. G. Steffes: May I be heard as a witness? My name is A. P. G. Steffes, and I was requested to come here from Las Vegas, Nevada, [42] because I first represented the company back in 1933 when a certain decision was made by the Internal Revenue Department, and when the investigation was made by Mr. Hanson, the engineer, and by Mr. Evans, a special agent, and I don't recall the name of the auditor, Wetsel, or something of that kind. Those three gentlemen and the president of the company came into my office in Las Vegas to consult with me with reference to the history of this case since the time that I came into the representation of the company in May, 1933.

I am speaking as a witness because of the fact that since that time, up until the present time, I be-

lieve, that I have kept pace with the facts in the case, and know the facts. However, there are certain facts connected with the bankruptcy of the corporation owning 51 per cent of the stock of the Chiquita Mining Company, Ltd., which is more within the knowledge of the trustee in bankruptcy, but in the interests of justice it would by my suggestion, and I agree with Mr. Rains, that if there is a deficiency, that deficiency would have been incurred prior to the time that the present trustee became trustee in bankruptcy of the corporation holding the control of this company.

When the bankruptcy proceedings are terminated, which I understood would be within several weeks, then the control of the company would again vest in the corporation which had it before, and then that corporation would have the responsibility of meeting the situation here.

Incidentally, when these three men from the government making the investigation came to my office, it took about three or four hours, I believe, for our conference concerning the past and the present at that time of the situation surrounding the deficiency levied here.

Now, there is another reason why, in the interests of justice, a [43] continuance should be granted. Very recently, well, within or since Pearl Harbor, gold mining has gradually decreased. Now it is practically impossible, particularly in the State of Nevada, where I practice, as well as here, to operate a gold mine. It will be necessary, in the event that a tax deficiency should be paid, since the mine can-

not be operated, that certain equipment be sold. That equipment can best be sold to certain companies engaged in defense work, and an amount realized from the sale so that the deficiency can be paid.

The matter is most complicated and involves a period of over nine years, and involves the legal effect, to a great extent, and I would say primarily, of two prior decisions of the Internal Revenue Department, as to the purchase price or the value of the mine at the time it was acquired by the Chiquita Mining Company, Ltd. At first blush it might appear that this is a simple matter, but I might say that prior to our concluding our conference, Mr. Evans, the special agent, voluntarily made the remark that the first and second findings of the Internal Revenue Department should be placed in the record, and that might be gone into.

The Judge: May I interrupt you a minute?

Mr. Steffes: Yes.

The Judge: What is your name?

Mr. Steffes: Steffes, S-t-e-f-f-e-s.

The Judge: What is your connection with the case? I don't see that your name is entered as counsel.

Mr. Steffes: I stated that I was appearing as a witness.

The Judge: We don't have any appearances as witnesses to control in the case. You are either counsel for the company or you are not.

Mr. Steffes: Well, I was asked to appear. [44]

The Judge: By whom?

Mr. Steffes: I was asked to appear by Mr. Sandrich and by the parties who will be primarily interested when the case—that is, when the ownership of the control of this mine vests back in the corporation which is now in bankruptcy, and when I stated my name I believe I did state that I was appearing as a witness. I wouldn't have stated what I have stated unless I had assumed that I would be permitted to make such a statement because of my knowledge of the facts, and because of the fact that the Government men came to see me to discuss with me my knowledge of the facts over that period of nine years.

The Judge: Is Mr. Sandrich in the court room?

Mr. Sandrich: I am Mr. Sandrich.

Mr. Steffes: Mr. Sandrich is present.

Mr. Tonjes: Your Honor, we would like to have the record show that the respondent is ready and willing to proceed.

The Judge: What I don't understand about this matter is simply this: This case is here by the initiation of the proceedings by the corporation, and you appeared as counsel, and the question involved has to do essentially with the depreciation of certain equipment.

Mr. Sandrich: May I amend that, your Honor, to say that the depreciation is important, but more important, and of practically the biggest part of the whole case is the depletion, and which bears upon the value to the corporation, the cost to the corporation, and the date when the physical properties were acquired, and as to whether or not the original

owners thereof were in control of the corporation immediately after such acquisition.

The Judge: Yes, but what I don't understand is what difference [45] it makes as to who happens to be the stockholder of record of certain shares of this company.

Mr. Sandrich: The point is my principal witness, the most important witness, the one that has the most intimate and complete knowledge of the whole thing happens to own a little over 51 per cent of the capital stock of the Chiquita Mining Company, Ltd., and his affairs and the affairs of some corporations in which he is interested are in bankruptcy.

He also has some other affairs pending before the Federal Courts, and he has been advised by his attorney that he should not testify in this matter at this time, because his affairs are in a state of flux. The bankruptcy is expected to terminate, the proceedings, in which case his properties go back to him.

I don't clearly understand all of the reasons myself, your Honor, except that I am left here without my most important witness.

Mr. Tonjes: Your Honor please, it might be pertinent here to inquire the name of the man who owns the 51 per cent. We have heard a lot of talk about some man or some person owning it.

Mr. Steffes: Maxfield Wilton and Associates, Inc., a corporation. That is a Nevada corporation which owns the stock approximately amounting to 51 per cent. I think it is 500,584 shares out of 1,000,000. The individual who controls that corporation

and likewise owns a considerable block of stock is James Maxfield.

Mr. Tonjes: Is he the man who is involved in the bankruptcy proceedings?

Mr. Steffes: In that respect he is involved in the bankruptcy [46] proceeding, in that he owns the control of the bankrupt corporation. He is involved in the other proceeding mentioned by Mr. Sandrich directly. And may I make this further suggestion, that these compromise proceedings, which I understand have been approved by Mr. Brink, who is out of town, were to go through some weeks ago, and if they had gone through, this matter would undoubtedly have been ready. A revision was made and at the present time those compromise proceedings have not been completed.

I did speak to Mr. Crawford, the trustee of the bankrupt corporation, whose duty, through counsel, it would be to prosecute—that is, to defend, rather, this particular matter, and he feels, as Mr. Rains has stated, that since the deficiency, if any, would have occurred prior to the time that he became the trustee of the bankrupt corporation, that the matter should be heard and determined after he is released from his status as trustee in bankruptcy.

The Judge: He is pretty late in making a suggestion of that sort, it seems to me. The notices were sent out and undoubtedly Mr. Sandrich, who has entered his appearance back in August, got it. I don't understand the complications.

Mr. Steffes: I think back in August—Mr. Rains,

isn't it true that other negotiations for compromise were pending and then there was a change made just comparatively recently in the bankruptcy matter?

Mr. Rains: Yes, that statement is correct.

Mr. Steffes: As a matter of fact, an order was made by Mr. Brink, and a new order was recently made, and it is the carrying out of the new order which will affect very essentially these proceedings here.

Mr. Rains: It will affect it in this respect, if the Court please, That under the plan of compromise, and which is just the matter of [47] working it out, all of the stock will go back to the corporation which is now bankrupt, Maxfield Wilton & Associates. I will answer the statement that way. I don't recall that Mr. Maxfield is the majority stockholder but, at any rate, the trustee would be right out of power. We heard nothing of this until last Friday night late, did not know of the existence of these proceedings, and we would like to keep out of the picture and let the individuals and the private corporations battle their own matters.

Mr. Tonjes: That is our position, your Honor please. We are willing to proceed with the corporation, the petitioner, and I think the affairs of the stockholder are of no concern to the Board.

Mr. Steffes: May I suggest——

Mr. Tonjes: May I finish?

Mr. Steffes: I beg your pardon.

Mr. Tonjes: We also want to make the statement that as late as Thursday of last week Mr. Sandrich

and I had a discussion and agreed to try this case today, and I can't see any reason why we can't proceed.

Mr. Sandrich: That was before—that was before I understood my witness would not be available, and for these reasons I ask the continuance.

The Judge: I don't understand about your witness. If you want him, get a subpoena out, and we will get him here. I mean that is no reason.

Mr. Rains: I suggest Mr. Sandrich make it clear to the Court why the witness is not able to testify.

Mr. Sandrich: I have explained it, the explanation that is given me. I won't say whether his reasons are valid or not. I am not able to judge those. He has given me those reasons. [48]

Mr. Steffes: May I make this answer, in explanation, to the representative of the Government, why we shouldn't proceed as against the corporation?

The corporation as a legal entity has no power to proceed. It can only, as I understand it, proceed through its board of directors, or otherwise. Now, the board of directors, the majority of the board, two out of three, were appointed by Judge James in the bankruptcy proceedings.

Mr. Tonjes: You mean this petitioner?

Mr. Steffes: The majority of the board, two out of three of the directors were appointed by Judge James, who was then alive, as the directors of the Chiquita Mining Company, Ltd., this petitioner, and I believe when the Maxfield Wilton & Associates, Inc., first went into bankruptcy, it was definitely understood that all matters would be taken up with

the Referee and instructions received. I personally believe, and it is my legal opinion, that without a definite instruction from the Referee as to how the trustee should proceed, that he couldn't legally proceed, but after the termination——

The Judge: Well, that is another matter.

Mr. Steffes (Continuing): ——after the termination of the bankruptcy proceedings, then there will be individuals rather than the appointed officers.

The Judge: I am going to set the case for Wednesday unless there is something better shown than that. You can talk with counsel, and tell him what you have to say, but what I don't understand is simply this: it seems to me here is a corporation, and I am not concerned with the stockholders or their bankruptcy proceedings. This case has been pending a long time. Notice was given. No point was made of any reason why it couldn't be tried, [49] and I don't see why the Government's tax against a corporation should be held up pending a fight among creditors or as to who may own the stock of that corporation, or what they may get out of it.

Mr. Steffes: There is no such point. It is just a question of terminating the legal proceedings in the bankruptcy court so as to re-vest the ownership, that is, the control rather than the ownership, in individuals rather than in a trustee of the court.

The Judge: Well, you can talk with counsel, but I am setting it now for Wednesday.

Mr. Steffes: I will probably have to be a witness, your Honor, and I came down from Las Vegas. I

am alone there, and I have to return tomorrow morning because I have no one to run the office, and it would work a hardship on me if I had to come back the very next day. I would suggest that the matter go further along towards the end of the calendar, if the Court can. I have certain other plans and cases pending and work to do in Nevada, and in Reno.

The Judge: Well, the difficulty I have with you is that you have no status in the case.

Mr. Steffes: I appreciated that fact, and stated it.

The Judge: Counsel is here and counsel is the only one I can actually recognize. Now, if you have anything to say, you take it up with him and let him be the spokesman, and we will get some order in the matter.

Let's call the next case.

(Which were all of the proceedings had on said date.) [50]

Thereupon the proceeding was continued for hearing to the 14th day of October, 1942, at 10:00 o'clock A. M.

Thereafter the proceeding came on for hearing on the said 14th day of October, 1942, at 10:00 o'clock A. M., before the Honorable C. E. Arundell, Judge of The Tax Court of the United States, at Los Angeles, California.

Mark J. Sandrich, Esq., and A. P. G. Steffes, Esq., appeared as attorneys on behalf of Petitioner; and E. A. Tonjes, Esq., for the Honorable J. P.

Wenchel, Chief Counsel, Bureau of Internal Revenue, appeared on behalf of the Commissioner of Internal Revenue, Respondent.

Thereupon the following proceedings were had, and testimony heard, to wit: [51]

PROCEEDINGS

The Clerk: 108263, Chiquita Mining Company, Ltd.

Mr. Tonjes: Respondent is ready.

The Member: Have you entered your appearances?

Mr. Sandrich: I beg your pardon?

The Member: Have the appearances been entered in this case?

Mr. Sandrich: I would like to enter a motion for recognition of additional counsel at this time, your Honor. Adam Paschal George Steffes.

The Member: Give it to the Clerk.

Mr. Steffes: I usually use just initials, to save time.

The Member: Have you been admitted to our bar?

Mr. Steffes: I was informed by Mr. Tonjes the other day that temporarily, for the purpose of this particular proceeding, counsel who has been admitted could move my admission. I am admitted to practice in all of the courts of the State of California and Nevada, State and Federal, and the Supreme Court of the United States, and the Treasury Department.

The Member: All we will ask is that you follow this up by making an application.

Mr. Steffes: Yes, I will.

The Member: That is all right. We will recognize you for this case.

Mr. Steffes: And I have filed my statement of appearance.

The Member: All right.

Mr. Tonjes: E. A. Tonjes appears for the respondent.

The Member: I would like to have counsel for the petitioner make a brief opening statement of what the case is about. [52]

OPENING STATEMENT ON BEHALF OF PETITIONER BY MR. SANDRICH

Mr. Sandrich: This is a petition for redetermination, your Honor, of tax liability arising out of the assessment by the Commissioner of additional tax on account of disallowance of certain items of depreciation and certain items of depletion; a disallowance of the items of depreciation brought about by the fact that the Commissioner claims a different rate from petitioner, and the disallowance of the depletion on the ground that the Commissioner claims that the petitioner has only part of a basis and has no cost basis on which to base his depletion rate.

The Member: Just what does that mean?

Mr. Sandrich: That means, sir, petitioner is a corporation to which certain assets were transferred

at its inception. The Commissioner claims that by reason of the alleged fact that the former owners of the property were in control of the corporation immediately after such transfer, that the basis in the hands of petitioner corporation should be the same basis as in the hands of the original owner. Petitioner claims that the original owners of the property were not in control of the corporation immediately after the transfer and, hence, that the assets are entitled to a different valuation to be used as a basis for depletion.

The Member: And it would be a different basis for depreciation too, wouldn't it?

Mr. Sandrich: No, your Honor, because the plant assets, machinery and equipment, were all purchased by the corporation after its incorporation. The properties transferred consist of mining claims only.

The Member: There is no question about percentage depletion in this? [53]

Mr. Sandrich: No, your Honor, not at this point.

The Member: I think I understand the question involved, and I will hear from Government counsel to see what they have to say.

STATEMENT OF CASE ON BEHALF OF RESPONDENT BY MR. TONJES

Mr. Tonjes: Those are the issues, as I understand them, your Honor. It is our contention that the various mining claims and mining rights which were transferred to the petitioner upon its reorganization, were transferred to it by two individuals, and

that they received all of the capital stock of the corporation in proportion to their holdings, and that, therefore, under 112(b)(5) of the 1928 Act, this transaction was a transaction on which no gain or loss will be recognized and, therefore, the base is the same as in the hands of the transferors; and that the issue of depreciation is merely one of the life of the properties under the circumstances under which the properties were used, and there is no question with respect to the cost, as I understand the issue; it is merely the life of the property; the rate, in other words, to be applied to it.

The Member: Would there be any question about the depletion if, in fact, we do not have a non-taxable transaction?

Mr. Tonjes: There is, then, a question of value, of course.

The Member: Which is in dispute?

Mr. Tonjes: Which is in dispute, yes, your Honor. That is the value of the property that they turned in, I believe, would be the question.

One question I would like to ask counsel. I think you stated in response to a question of the Board that the matter of percentage depletion was not in issue at this moment or at this time. Could it ever be injected?

Mr. Sandrich: I didn't mean to give that impression. It was [54] once, but there is no hope for us raising that point now. We are through with that point.

Mr. Tonjes: I have no further statement then, your Honor.

The Member: Very well. Call your witness.

Mr. Steffes: May I just add something, your Honor, by reason of the history of the case? I will try to make it brief.

On two prior occasions the question of the value—that is, the price, rather, that the corporation, the petitioner here, paid, for the mining properties was raised by the Internal Revenue Department of the United States of America. On each of those occasions we, after a discussion agreed to have our opinion coincide with that of the Government. On the first occasion, which happened in May, 1933, we paid an additional tax, and what amounted to a penalty. In approximately June or July, 1934, the company paid an additional tax, based upon the Government's contention, that is the Internal Revenue Department at Reno, and I wish to make it clear at this point that it was not merely the contention of a clerk in the office selling stamps or collecting the tax, but it was a contention made by the Internal Revenue Department at Reno, Nevada, the State where the corporation has its mining properties; and on both of these occasions the Government held that the value of the mining properties was \$500,000. When this matter was investigated by Mr. Hanson, he was at the mine and later came to my office in Las Vegas with—I don't recall the name, whether it was Whistle—it was the auditor, and Mr. Evans, a special agent of the Internal Revenue Department. We stayed discussing this particular question for I think it was several hours. Although the auditor claimed that that was not in issue, the special agent claimed

that that was a matter that should be put into the record, that is, the Government's [55] record, and as far as I know, it was put in the record. And I believe that—and it was recently confirmed within the last year and a half by an auditor of the Internal Revenue Department when an investigation was being made by the Securities and Exchange Commission, where they claimed the value was \$250,000 instead of \$500,000—that that is a matter which should be gone into and should be in issue, because the Government, I think, now claims if the question of value is in issue it will amount to approximately—I use the word “value”; I should say “price” to the corporation—it should be approximately \$100,000 or \$101,000, where we maintain it should be \$500,000 or approximately five times as much as the Government's figures are based upon.

Mr. Tonjes: Might I make just one inquiry, your Honor?

Counsel has referred to the fact that they have paid a tax. I think it might clarify the record if he states the nature of that tax, whether it be a stamp tax or capital stock tax, or what. My information is that it was a tax on the transfer of securities.

Mr. Steffes: It was both. In the first instance, in May, 1933, the local representative of the Internal Revenue Department determined that although only approximately 135,000 or 140,000 shares of stock—that is the certificates—had been issued by the corporation in payment for the mining properties, which later produced over a million dollars;

that when the deeds were transferred in legal contemplation and under the theory of the Internal Revenue Department the transaction was complete, and, therefore, the Government was entitled to the full tax of \$500 on a price to the corporation of \$500,000. That was the first. We paid a deficiency of in excess of \$300, and also what amounted to a penalty of \$40. [56]

The Member: I thing all that is utterly immaterial.

I would like to make it clear to you, as you are just new at our bar, that this determination of the Commissioner of Internal Revenue comes to us with the presumption of correctness. We have no information, nor are we the slightest bit concerned with what the Bureau of Internal Revenue has done in the past. We are trying your case just like you are entering into the Federal District Court to try it, and we have none of the records, none of the information; only this determination.

Mr. Steffes: Well, we had intended to supply that information in the form of legal evidence.

May I make this suggestion? I had the same situation in an inheritance tax case that went up to Washington, and we had an analgous situation where, although we had the determination of the State Inheritance Tax Department and the Federal Department here that we were correct, nevertheless when it went to Washington first a decision was rendered against us. We paid the tax under protest and, as your Honor suggested, we were then placed in the position of entering the Federal Court.

In that case we were able to show, as we hope we can show now, that the legal principle upon which the Government proceeded was erroneous.

The Member: That is right.

Mr. Steffes: And in that case the Government refunded the tax paid with, of course, the interest at 6 per cent.

In that particular case, too, I was told, not by the Court, but it was suggested to me by the bank which was the trustee in this estate, that I was up against a situation where I couldn't present it, and yet when it was presented the Court held that the factual situation was correct and found ultimately in our favor and refunded the tax; and I think that [57] for the benefit of all parties concerned, it will save the time of the various officials of the Government and arrive at what I would call moral justice in the payment of the tax.

The Member: That is a matter for you to negotiate with the Government, but it is not for me. You are trying a lawsuit before me.

Mr. Steffes: Yes, I understand that.

The Member: The Commissioner of Internal Revenue is before me a party litigant. He is just one of the parties to this lawsuit.

Mr. Steffes: Well, as I stated at greater length, and probably at too great length, the other day, that it is not just a simple point.

The Member: I see.

Mr. Steffes: But that when gone into thoroughly it becomes a point which is duplex, at least duplex, and in determining the case completely, both parts

of the question should be determined. That is whether first, the ordinary method of computation should be followed; and, secondly, whether the facts that I have related have a bearing upon the first situation and should legally raise, that is, cause a different conclusion to be arrived at.

The Member: All right. There is only one thing I am going to say to you. In our practice here only one person makes a statement, and only one counsel examines a single witness. So you can be governed accordingly.

Mr. Steffes: Well, I will ask permission to make a statement because of that particular fact, and I did ask at the beginning of this whether I could make such a statement.

The Member: Very well. Call your witness.

Mr. Steffes: Counsel and I wish to be understood that for the [58] purpose of this proceeding that I will be of counsel with Mr. Sandrich, who is admitted before the Board. I have already filled out the blank and filled out my statement of appearance. Am I correct in that assumption, that I will be allowed to——

The Member: You will be recognized for this case.

Mr. Steffes: Yes.

Mr. Sandrich: Your Honor, at this time I would request that a subpoena be issued for the appearance of James Maxfield and Hugh Wilton as witnesses for petitioner.

The Member: Where are they, in the court room?

Mr. Sandrich: I think Mr. Steffes has knowledge of their whereabouts.

Mr. Steffes: May I?

The Member: It seems to me you are pretty late in asking for subpoenas. I will issue the subpoenas if you want them, if you have made application for them, but I am not stopping the proceeding. I am going ahead.

Mr. Steffes: Well, may I just make a statement on that point to clarify it?

Day before yesterday Mr. Sandrich refrained, undoubtedly on account of Mr. Maxfield and Mr. Wilton, for their sake, to state the reason why there were complications pending before the Federal Court was that Mr. Maxfield and Mr. Wilton were indicted by the Federal Court in Nevada on income tax matters which are approximately the same dates and relate to the same mining properties, the income from the same mining properties. Mr. Wilton has his own counsel, who is Mr. Alfred L. Bartlett of this city, and I represent Mr. Maxfield in the Federal Court. That matter has not [59] been disposed of but is now pending on demurrer before the District Court of the United States in and for the District of Nevada, and it was because of Mr. Bartlett's advice, first, to Mr. Wilton, and then my corresponding advice to Mr. Maxfield that this application comes at this time.

The Member: Now, how do you expect to get them here? This is the time to hear this case. I will have my clerk go ahead and make out a sub-

poena and give it to you. In the meantime, proceed.

Mr. Sandrich: I will call Mr. James J. Smith.

EVIDENCE ON BEHALF OF PETITIONER

Thereupon the petitioner, to maintain the averments of its petition, introduced the following proof:

MR. JAMES J. SMITH

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sandrich:

Q. Mr. Smith, you are acquainted with the petitioner, Chiquita Mining Company, Ltd.?

A. Yes, I am.

Q. Are you connected with petitioner?

A. Yes.

Q. Will you please explain to the Court your present connection with petitioner?

A. I am the president of the company.

Q. Will you please explain your connection with the company between the early part of November of 1932, and the end of December, 1939?

A. I was the manager of the company. [60]

Q. Did you have any title in the company? Were you an officer or a director?

A. Yes. The fore part of that period I was vice president. The latter part I was president and director.

(Testimony of James J. Smith.)

Q. Prior to November, 1932, did you have any connection, any interest in the assets that were turned over to Chiquita Mining Company, Ltd., a corporation, exchange for part of its capital stock?

A. Yes, I did.

Q. Will you explain to the Court what connection you had there, what rights you had in that, interests?

A. Well, I was a party of the original owners that owned the property before turning it over to the *in* corporation.

Q. What did the property consist of?

A. In mining claims.

Q. Who else besides yourself was interested, had any interest in those mining claims?

A. Yes; other parties.

Q. Would you name them, please?

A. Otto F. Schwartz, Fred Reim, Sam McClanahan, Jack H. Smith, C. P. Smith, Jack Falbey, Tom Keeler.

Q. Are you acquainted with James Maxfield?

A. Yes, I am.

Q. Are you acquainted with Hugh Wilton?

A. Yes.

Q. Will you tell the Court in what way those two parties participated in the formation of the corporation?

A. Yes. It was agreed by the original owners, the parties I have just [61] named, that Maxfield and Wilton should incorporate the property for

(Testimony of James J. Smith.)

the purpose of obtaining finances to develop the property.

Q. And there were written agreements to that effect? A. Yes.

Q. Were you one of the parties to the written agreements? A. Yes, I was.

Q. And were you one of the parties appearing as owner of the claims which were transferred to the corporation? Did you sign those agreements?

A. No, I didn't.

Q. Will you explain why?

A. It was agreed between the parties interested, there being so many, that the work, the actual agreement would be carried on by two members of this group, Jack H. Smith and Otto F. Schwartz, and all documents and agreements were signed by these two persons.

Q. Did you have knowledge of the contents of all of these documents and agreements that were signed by these two persons with regard to these transactions? A. Yes, at all times.

Q. How did you gain that knowledge?

A. Through discussions with these two parties, Jack H. Smith and Otto F. Schwartz.

Q. Did you ever discuss it with the other parties to the agreement; namely, Maxfield and Wilton?

A. In nearly all cases.

Q. Did you ever discuss the contents of these agreements when Otto F. Schwartz and Jack H. Smith and Hugh Wilton and James Maxfield were all [62] present at the same time?

(Testimony of James J. Smith.)

A. At times, yes.

Q. You are, then, familiar with all the agreements contained in those instruments?

A. Yes, I am.

Q. What exactly were your duties at the mine?

A. During the fore part or the latter part of this period?

Q. Beginning with the fore part and working up. I don't ask for very long.

A. I was just a worker.

Q. What do you mean by that?

A. Well, I was one of the seven original parties who opened up the mine and were continuing to develop it. This work was carried on during the time of this negotiation, and for a time afterwards.

Q. Now, after the company was incorporated, what became your duties?

A. For the first year exactly the same, as an operator.

Q. And will you work up from there, please?

A. Then in '32, Jack H. Smith, who was my brother, died, and at that time I took his place as president and manager of the company.

Mr. Steffes: What year was that?

The Witness: That statement is erroneous. He took sick at that time and his death didn't occur until a couple of years later. But it was at that time that I took over the management of the property.

By Mr. Sandrich: Q. In the management of

(Testimony of James J. Smith.)

the property you exercised a certain amount of administrative and supervisory duties? A. Yes.

[63]

Redirect Examination

By Mr. Sandrich:

Q. Mr. Smith, following your cross examination yesterday, you and I consulted certain files and records and had certain conversations with regard to certain testimony that you had given, for the purpose of refreshing your mind on certain angles, did we? A. Yes.

Q. Your recollection as to certain items is now a little different from what it was on those certain points? A. Well, yes, it is.

Q. I would like to take you back over some of that. You stated in your answers yesterday to Mr. Tonjes that the original cost of equipment was \$10,000. Did you mean all of the equipment or part of the equipment, or what did that \$10,000 cover?

Mr. Tonjes: If your Honor please, I object to the question. It is quite obvious that there are some written records here by which these various facts can be proven. I presume they are corporate records. I object to the witness testifying as to his recollection, and his construction placed upon his examination of documents is not the best evidence.

Mr. Sandrich: The documents here concerned, your Honor, constitute the records of the corporation, and I would like to explain that. The corpo-

(Testimony of James J. Smith.)

ration was formed in the latter part of 1932, and between that time and some time in 1938 there were no adequate records kept. They did the best they could. They kept all of their checks, they kept all of their invoices and vouchers, and they made several abortive attempts to keep a cash book. In the beginning at 1938 I was retained to make a complete audit of the affairs of the corporation, to do whatever was necessary to be done to disclose any [64] additional tax liability, of which I found somewhere near \$7,000 and which they paid voluntarily. I have a complete set of audit files on the case, which practically sets forth each individual transaction. Now, I say, "practically." There may be a dozen or so not there, as will happen in the most careful audits. I did not put the details of my audits into any book of accounts, but kept my working papers as the records of that company.

During the latter part of 1938 or the beginning of 1939 we did set up a system of accounts and books and we opened that by entering therein my balance sheet as of that date as a beginning point. My audit files, therefore, will constitute the records of the corporation, the books, you might say, of the corporation, prior to the time in late 1938 or the beginning of 1939 that we opened up formal books of account.

The Member: Well, I am going to overrule the objection anyway. The witness can answer the question.

(Testimony of James J. Smith.)

Thereupon the question was read, and the witness proceeded to testify at length concerning the facts relating to the issues of depreciation.

On the completion of said testimony on said issue of depreciation, the witness was excused.

Thereupon the proceedings continued as follows:

[65]

Mr. Sandrich: This is on depreciation. I would like to ask Mr. Steffes to take the stand, please.

MR. A. P. G. STEFFES

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sandrich:

Q. Will you state your name, please?

A. A. P. G. Steffes.

Q. In addition to any connection you might have as counsel in this case for Chiquita Mining Company, Limited, a Nevada corporation, have you any connection with that corporation?

A. Do you mean had I and have I?

Q. Have you at this present time?

A. Yes. I represent the Chiquita Mining Company, Limited, in certain litigation, and have represented the company since May, 1933.

Q. At any time during your representation of the company were you charged with the duty of

(Testimony of A. P. G. Steffes.)

retaining the services of a certified public accountant? A. I was.

Q. And for what purpose, please?

A. We had certain litigation pending in the 8th Judicial District Court of the State of Nevada, in and for the County of Clark, on a mandamus proceeding, brought by a stockholder or a small group of stockholders, and at that time I stated to the court that a complete audit would be made by a certified public accountant of all of the books and records of the corporation from the time the corporation first formed and took over the properties, up until the—up until that time or at the end of the taxable year, which was, I believe, December 31, 1938. [66]

Q. Did you obtain the services of such an accountant? A. I did.

Q. And who was he, please?

A. Mark J. Sandrich, a certified public accountant, in Los Angeles, California.

Q. Did you instruct the certified public accountant with regard to what you wanted him to do? A. I did.

Q. Will you kindly repeat the instructions that you gave him?

Mr. Tonjes: May I ask the purpose of this line of questioning, your Honor? I think it would be pertinent.

Mr. Sandrich: Yes, your Honor. I have explained before that the company had no books and records. What I am leading up to is an offer of

(Testimony of A. P. G. Steffes.)

my audit records of that period as the records of the corporation.

The Member: Well, as I understand the question, on the point that is being tried, of the rate of depreciation on certain mining machinery and equipment, the parties are in agreement on the cost; the question is, what is the life? I can't see where a lot of this testimony is relevant.

Mr. Sandrich: There seems to have been some difference of opinion, your Honor, or at least difficulty regarding amounts and dates and quantities, and I wanted my records here for the benefit of counsel for respondent and myself.

The Member: Well, it seems to me it would be very doubtful whether it is admissible, but I would have to reserve that until it is offered and see just exactly how it is offered. But you have a very narrow question here, and what testimony you offer ought to be on that one question: How long the machine will last for the job it's doing.

Mr. Sandrich: I will withdraw the question, your Honor. [67]

The Member: Any further questions of this witness?

Mr. Sandrich: No.

The Member: Just step down, please.

Witness excused.

Mr. Sandrich: I have succeeded, your Honor, in having served subpoenas on James Maxfield and Hugh Wilton, and they are now available. I would like to call James Maxfield.

Mr. Sandrich: Your Honor, at this point I desire to make an offer to counsel for respondent of all of my audit papers and any other of my papers and files which I might have in connection with the audit or with the books and records of the company covering the period from the company's inception up until such times as formal books of accounts were opened.

Mr. Tonjes: You are offering that to me?

Mr. Sandrich: Yes.

Mr. Tonjes: For what purpose?

Mr. Sandrich: For your inspection; and when I have an opportunity to bring them into the room I shall offer them as evidence, as exhibits.

Mr. Tonjes: Let that fact be noted, your Honor. I don't think I need make any remarks at this time.

Mr. Sandrich: I would like to call Mr. Maxfield.

Mr. Steffes: Mr. Maxfield and Mr. Wilton were here but they are out now. May I call them?

The Member: How much longer do you expect to be, Mr. Sandrich?

Mr. Sandrich: On this depletion, your Honor, I will need at least two and a half hours.

Will Mr. Maxfield please take the stand? [68]

MR. JAMES MAXFIELD

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sandrich:

Q. Will you state your name, please?

A. James Maxfield.

Mr. Steffes: At this time may I step out of the role of associate counsel in this tax proceeding, because I also represent—

The Member: I am sorry, but you cannot take these dual roles that you have attempted several times in the court room. I am going to recognize you, as I told you, as an associate counsel, and if you have anything else to say you will have to say it as a witness on the stand.

Mr. Steffes: No. Your Honor didn't permit me to finish. I am appearing as the attorney, duly licensed to practice in this Court and the Federal Court of the State of Nevada, for this particular witness in a proceeding pending in the United States District Court in and for the District of Nevada, and since I am his sole counsel in that proceeding, I desire to represent him, as it is my legal and ethical duty to represent him when he is called as a witness in a matter which vitally affects the proceedings pending in the United States District Court in and for the District of Nevada, and I am not appearing, as I did on the first day, as a witness, but I am appearing as an attorney

(Testimony of James Maxfield.)

at law, duly licensed in all the courts of this state and the State of Nevada and Supreme Court of the United States and all the Federal Courts.

The Member: Well, you are not going to be recognized in any such way. Now, you are here as counsel of record for the Chiquita Mining Company and you are calling this witness to the stand and by calling him you [69] are vouching for him. Now, that's all. If your duties are such that you cannot occupy the dual position, you should withdraw from the case. You should not put yourself in a position of having inconsistent duties or allegiance here.

Mr. Steffes: They are not, and under the law, as I understand it, they are not inconsistent or dual. They are cumulative, in that——

The Member: Well, I don't want to argue it with you.

Mr. Steffes: Well, then I will——

The Member: Are you calling this witness?

Mr. Steffes: I am not calling the witness. Mr. Sandrich may call the witness and the witness may speak for himself and testify or refuse to testify on whatever grounds that he desires to do so.

The Member: Let us proceed.

By Mr. Sandrich:

Q. Did you state your name? Or, if you didn't, will you state your name, please?

A. James Maxfield.

Q. What is your line of work, Mr. Maxfield?

A. I am a financial man, and a mine operator.

(Testimony of James Maxfield.)

Q. What was your line of work in the latter part of the year 1932?

A. I was corporate manager, mining, and other enterprises.

Q. Had you ever had any experience, or had you ever made it a part of your business to secure capital for companies or for newly formed companies?

A. I think at this time I should explain to your Honor that I am going to refuse to testify any further in this proceeding. I refuse on the grounds that I am now under indictment by a Federal Grand Jury in the State of Nevada, and that indictment is pending before Judge Norcross now, and to testify without the advice of counsel or to go any further in this matter at this [70] time would be to place myself in a peculiar position, where I would not understand—I am not trained to understand the matter or whether I should or shouldn't testify. I am under indictment by the Federal Grand Jury on the solicitation of the Internal Revenue Department.

By the Member:

Q. May I ask you this? A. Yes.

Q. Is that indictment at all connected with this Chiquita Mining Company?

A. The indictment grows out of and all of the charges in the indictment, as I read them, are a direct result of the Chiquita Mining Company's affairs and my connection with the Chiquita Mining

(Testimony of James Maxfield.)

Company's affairs, as the Internal Revenue knows, and that was the reason why I didn't voluntarily appear here as a witness.

As soon as the indictment is disposed of I would like to have my day in court, to come in here and explain the situation and testify fully. I find myself very much embarrassed that I have to come before any court and refuse to testify on any grounds. I resent the indictment. I resent the implications.

The Member: Now, just a minute.

Have you anything to say, Mr. Sandrich?

Mr. Sandrich: Not to this witness, no, your Honor.

The Member: Well, if this witness has been charged with the violation of the law under a criminal indictment growing out of some transactions with this company or its financing, or what not, I think that he may very well plead that it may tend to incriminate him.

Mr. Sandrich: Your Honor, I agree with that, and I have no desire to force the witness to incriminate himself.

The Witness: May I interrupt there? I am not saying that I would incriminate myself in any way.

[71]

The Member: No.

Mr. Sandrich: May I amend that? I have no desire to place the witness in any kind of an embarrassing position or to be the cause of any implications arising. I merely want to state to your

(Testimony of James Maxfield.)

Honor that Mr. Maxfield, because of his close connection with all of the affairs that have to do with this depletion matter, and because of his almost total knowledge of very important affairs that have to go into it, is a very important witness.

Mr. Tonjes: For the record, your Honor, I think it might be proper for me to state that from my knowledge of the facts in this case, Mr. Maxfield did play some part in the organization of the petitioner, and the issue before the Board in the depletion question, as I gather, relates to the manner in which the petitioner acquired certain assets and whether or not the purchaser from whom they acquired those assets remained in control of the petitioner, and it is my belief that Mr. Maxfield might know something about the affairs, I mean the circumstances surrounding the organization of the petitioner. Whether he is a necessary witness or not, I am not prepared to state.

Mr. Sandrich: May I take the liberty of adding to your remark, counsel? Mr. Maxfield not only has some knowledge of those affairs and Mr. Maxfield not only played some part in those affairs; Mr. Maxfield, I believe, played the main part in those affairs and had a total, first hand knowledge of all of them.

The Member: Well, I don't know what all these things are about.

Mr. Sandrich: I merely want to let your Honor know the importance of Mr. Maxfield to our case. I have no further questions.

The Member: Step down.

(Witness excused.) [72]

The Member: It seems to me any one of many people could testify as to the mechanics of the operation whereby the property was taken over, and there must be written contracts that disclose how it was done.

Mr. Sandrich: Those written contracts, your Honor, have been delivered to the Treasury Department and to the S.E.C. and at the present time I haven't been able to get hold of them.

The Member: You could have gotten hold of them by a subpoena.

Mr. Sandrich: If we could find them, to know where they are at this time.

Mr. Steffes: You see, Mr. Crupf, the investigator, died, and we offered all of the records and contracts, everything, gave them into his possession, and things like that, and certain of these things we have been unable to locate. I was called in at the last minute and didn't expect to act as counsel until a certain emergency arose a year ago, or almost a year ago.

The Member: Call your next witness, Mr. Sandrich.

Mr. Sandrich: Mr. Wilton.

MR. HUGH WILTON

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sandrich:

Q. Will you state your name?

A. Hugh Wilton.

Q. Mr. Wilton, do you refuse to testify?

The Member: Now, wait a minute. Just let us ask him some questions.

Mr. Sandrich: All right, your Honor.

The Member: And if the time comes that he thinks that any part of them involve this and he wants to say so, all right. [73]

Mr. Sandrich: I was merely trying to save your Honor's time. I am sorry, sir.

By Mr. Sandrich:

Q. What is your line of work, Mr. Wilton?

A. Real estate broker.

Q. What was your line of work in the latter part of the year 1932?

A. I was working for Mr. James Maxfield.

Q. In what capacity, please?

A. I was associated with him in the financing of the Chiquita Mining Company.

Q. And what part did you play in said financing?

The Witness: Your Honor, I would like to refuse to answer those questions on the general conditions that Mr. Maxfield named.

(Testimony of Hugh Wilton.)

By the Member:

Q. You are under indictment?

A. I am also under indictment on the same charges.

Q. Do you know what the nature of the indictment is? What does it charge?

A. Well, I read the indictment over, your Honor, but I don't fully understand—I didn't fully understand it. Charges were four, I believe, in number. Generally, as I understood it, it was fraud arising out of the sale of Chiquita Mining Company stock in regard to profits that were allegedly made from the sale of the stock.

Q. Well, is it a State charge or Federal charge?

A. Federal charge.

Q. Using the mails? A. No. [74]

Mr. Maxfield: No, your Honor, it isn't, and may I interrupt?

The Member: Just a minute.

Mr. Maxfield: My future is tied right up to this, to what this man says, and I am not represented by counsel.

The Member: Now, just be patient.

Mr. Maxfield: We are under common indictment, if your Honor please.

The Member: Just be quiet. There will be nothing that will affect you at all.

Mr. Maxfield: This is making a record.

The Member: No.

Mr. Steffes: Sit down, please.

(Testimony of Hugh Wilton.)

By the Member:

Q. You have the feeling that it would not be wise, by reason of that indictment, to testify?

A. Yes, I have, your Honor.

The Member: I will not require you to answer under the circumstances.

Anything further?

Mr. Sandrich: I would like to ask a question, your Honor, in order to save time. I would like to ask the witness at this point whether he will or will not answer my further questions, to save the Court's time, and that will be the only question I have.

Mr. Steffes: I believe that has been answered. He refuses.

Mr. Sandrich: That is all I have, sir.

The Member: Very well, you can step down.

(Witness excused.) [75]

Mr. Steffes: May I be heard on one subject as counsel in this proceeding?

I personally know of my own knowledge that one of the men, Mr. Maxfield, is the only living man—Mr. James J. Smith's brother being the other—of certain conditions arising or affecting the depreciation of the unit purchased at the Belle Helen mine on the other side of Tonopah, and I personally know that the testimony of both of these two men is vital and essential to a proper and complete determination of the issues before the Board.

The Member: Just proceed with your case.

Mr. Steffes: I suggested, since counsel called the witnesses, that he make the motion but he requested me to make the motion in this proceeding, that in view of the refusal of the last two witnesses, Mr. James Maxfield and Mr. Hugh Wilton, to answer further questions on their constitutional grounds, which I believe the Court understands, that it is essential to a proper disposition of this case that the hearing, insofar as proof on the part of petitioner is concerned, be continued until such date as that constitutional guarantee is removed by a final disposition of the indictments pending against the two witnesses last called, and I so move, and under the rules I shall prepare a motion to that effect, unless your Honor will dispense with the necessity of a written motion for a continuance upon the grounds stated.

The Member: That motion will be denied. I don't think that you make a case at all.

Mr. Steffes: I didn't understand.

The Member: I say I don't think you make any case for your position at all.

Mr. Steffes: On—— [76]

The Member: Now, just a minute, if you will just listen to me.

Mr. Steffes: I thought your Honor had finished.

The Member: No, I haven't. This case has been set a long time. You yourself, say, are counsel for these witnesses who refuse to testify. You have known all about it. Now, all we want to know in this case is how a certain transaction was carried but, not the details, but the broad general principles,

to see whether you come within the Revenue Act. Now, there is no showing—there might be any number of people who would know about it. I would think any person who had anything to do with it would know about it.

Mr. Steffes: Well, I could testify——

The Member: Now, you cannot come into court in this manner at the last minute and ask for continuances and delays for reasons of this sort.

Mr. Steffes: May I suggest that the cause for the delay was not occasioned by these defendants in the indictment proceedings before them, but was caused by, may I say, the routine of the District Court in which the indictments are pending; that just recently, and the last step taken—that is, we filed our brief within the time, by associate counsel—was a request for a continuance by the Government to file a brief on a demurrer to the indictments, and that request was primarily occasioned by the fact that the Assistant United States District Attorney who had handled the indictment had just resigned before the demurrer was filed for the purpose of running for another office in the State of Nevada, and a younger man who did not know the facts as well as the man handling the case took it over and requested a certain length of time, which was later extended by the Court, within which to file a reply to our memorandum of points and authorities, which were filed promptly and on the day that we appeared and filed the demurrer, and also a motion for a bill of particulars; and we have tried

to hurry this matter and to have eliminated as much as we could. [77]

The Member: Mr. Sandrich, do you have anything further to offer?

Mr. Sandrich: Mr. Steffes, please.

The Member: I noticed in your statement that you named some seven people who were interested in this matter.

Mr. Sandrich: I believe I mentioned several people.

The Member: Not several but seven.

Mr. Sandrich: Seven?

The Member: Yes.

Mr. Sandrich: Yes, sir.

The Member: I should think any one of the seven, plus the documents, could establish what you are talking about.

Mr. Sandrich: I believe I can with this witness, your Honor.

The Member: All right.

Mr. Steffes: Should I be sworn again?

The Member: No, you have been sworn once in the case.

MR. A. P. G. STEFFES

having heretofore been first duly sworn was recalled to the stand, and was examined and testified as follows:

Direct Examination
(Resumed)

By Mr. Sandrich:

Q. Mr. Steffes, will you please state what your duties or what you did in connection with the—I will withdraw that. Will you please state what you had to do with the original agreements between the parties constituting the original owners of the mining claims transferred to Chiquita Mining Company, Limited, and the transfer of said claims, the receipt thereof by the Mining Company, and the issuance of stock therefor? Will you please state what you had to do with regard to those matters?

A. With reference to the original transfer of the claims constitut- [78] ing 14 mining claims to the——

Mr. Tonjes: I object to that, your Honor, as not being the best evidence of what was transferred to the corporation and what the claims were.

The Witness: Well, I will withdraw that portion of it. With reference to the transfer of certain mining claims to the Chiquita Mining Company, Limited, which occurred immediately after the incorporation——

Mr. Tonjes: I object to the witness stating when the properties were transferred, your Honor. The deeds and the records of the corporation are pre-

(Testimony of A. P. G. Steffes.)

sumably all available, and to have this witness narrate what his construction of the facts are is highly objectionable.

The Witness: May I——

The Member: Just a minute.

Mr. Sandrich: I don't see, your Honor, that the witness is narrating his construction of the facts. The witness is speaking of his own knowledge, because he actually saw and inspected and in a good many cases prepared the documents effecting such transfers.

The Member: Well, it seems to me that you must bring the witness by some short question and answers to the point as to whether he can testify.

Mr. Sandrich: Yes, your Honor.

The Member: Now, it isn't necessary, if you ask him what his connection with it is, that he should tell the life history. He can say "I was counsel for the sellers," or "the purchasers," and stop, and you ask another question and we can see where we get.

Mr. Sandrich: Yes, your Honor.

By Mr. Sandrich:

Q. Did you represent the Chiquita Mining Company, Limited, in the acquisition by it of the 14 mining claims originally transferred to it by Jack H. Smith and Otto F. Schwartz? [79]

A. Not at the exact beginning.

The Member: Just answer yes or no.

(Testimony of A. P. G. Steffes.)

By Mr. Sandrich:

Q. Did you at any time represent Chiquita Mining Company on those particular matters?

A. I did.

Q. When?

A. I began to represent the Chiquita Mining Company, Limited, during the month of May, 1933.

Do I have the privilege here, as in other courts, to explain the answer; that I also represented all the other parties connected with the transactions; that is the miners and Mr. Maxfield, and Mr. Wilton, who handled the affairs? May I have that privilege?

The Member: You have already answered, haven't you?

The Witness: Well, I, as counsel, will be willing to stipulate to strike if I don't have the privilege.

The Member: That is enough. You have said enough.

By Mr. Sandrich:

Q. In connection with those particular transactions, did you represent in any way James J. Maxfield? A. I did.

Mr. Tonjes: I object to the question, your Honor, as being irrelevant and immaterial. The issue in this proceeding on this issue is whether or not the persons who transferred the property to the petitioner at the time of its organization had, after its organization, the same interest in the corporation as they theretofore had in the properties trans-

(Testimony of A. P. G. Steffes.)

ferred; and the corporation was organized in 1932, November 18, 1932, to be exact, and it acquired these properties, as I understand it, sometime prior to the date to which the witness is referring. [80]

Mr. Sandrich: Your Honor, these questions are leading directly to that point. I am only attempting to show that the witness is capable of answering such questions with regard to those agreements and those transactions as I shall ask him, because even though he did not come into the picture until a short time afterwards, he had control of, inspected, discussed with the principals and advised on the documents that reflected those agreements, and also in certain very important particulars was under the necessity of making some adjustments and some corrections of contradictory or erroneous portions thereof. Therefore, I maintain that these questions do lead to the point.

The Member: Well, I want you to have every opportunity, but I want it to be conducted in the way a lawyer would conduct it, and I want this gentleman to realize that he is here as a witness now and not as an attorney, to answer questions the way a witness would answer; no arguments.

Mr. Sandrich: I will do my best, your Honor.

The Member: No long involved answers, but as concise as you can make it.

Mr. Tonjes: Might I renew my objection at this time, and might I state I necessarily have to be very precise in the character of testimony that comes in,

(Testimony of A. P. G. Steffes.)

due to the fact that there are some other proceedings pending and what might be adduced in this proceeding might have some bearing on the other proceeding; therefore, I am going to be as technical as I can in order to protect the record.

Mr. Maxfield: May I inquire as to what proceedings counsel refers to?

The Member: I must say that you cannot act in this matter. You are in court.

Mr. Maxfield: I realize that.

The Member: You are not a petitioner to this proceeding.

Mr. Maxfield: I realize that but I am here without counsel. [81]

The Member: Just be seated.

Mr. Maxfield: And this man is my counsel.

The Member: You just be seated.

Mr. Maxfield: And he is being asked to testify.

The Member: You just be seated now.

Mr. Sandrich: Will the Reporter please read back the last question that I asked?

(Whereupon the reporter read the question as follows: "Q. In connection with those particular transactions, did you represent in any way James J. Maxfield?")

By Mr. Sandrich:

Q. And in connection with those particular transactions, did you represent in any way one Hugh S. Wilton? A. Hugh Wilton. Yes.

Q. Hugh Wilton. And in connection with those

(Testimony of A. P. G. Steffes.)

particular transactions, did you represent Jack M. Smith? A. I did.

Q. In connection with those particular transactions, did you represent Otto F. Schwartz?

A. I did, indirectly.

Q. Will you please explain what you mean by that?

Mr. Tonjes: I object to the question as being irrelevant and immaterial, your Honor.

Mr. Sandrich: The question is material, your Honor, because Otto P. Schwartz was one of the original parties to all of these agreements.

The Member: What are you trying to get, what point, with this witness?

Mr. Sandrich: I am trying to establish the fact that this witness [82] knows of his own knowledge certain elements of the agreements and actual occurrences in connection with the transfer of properties to Chiquita Mining Company, Limited, and the issuance of its stock for those properties that result in the owners of the properties not being in control of the corporation after such transfer.

The Member: I take it the transaction was in writing. That is, a transaction certainly conveying the mining claims would be.

Mr. Sandrich: Yes, your Honor.

The Member: And I suppose the agreement to transfer to the corporation for shares of stock was in writing?

Mr. Sandrich: There were a number of agreements. There seemed to have been some confusion

(Testimony of A. P. G. Steffes.)

in the early stages of the game, your Honor, and it appears that a number of the matters were handled in a manner not contemplated or not desired by the parties, and a great number of adjustments, amendments and substitutions were made which result in a very complicated mess, to use that word. Now, your Honor remarked a while ago that your Honor was interested in the broad aspects of the thing and was not so much concerned with the details but wanted enough to show whether or not this situation resulted in the original owners of the mining claims having the control of the corporation after such transfer.

The Member: But it has got to be in a legal way.

Mr. Sandrich: I am trying to do it in a legal way, your Honor. I am trying to question this witness.

The Member: The way to do it is to first produce the contracts, put people on the stand to identify them, bring out the minutes of the corporation, if you have anybody who was actually a party to the contract to explain it, bring them and put them on the stand. [83]

Mr. Sandrich: Those are in existence, your Honor, but they are not in court. Some of those records are in Nevada. Some of those records are in the hands of the Treasury Department, and I believe some of them are in the hands of the S.E.C.

The Member: They all can be reached by a subpoena, anywhere in the United States.

(Testimony of A. P. G. Steffes.)

Mr. Sandrich: May we have sufficient time in which to secure those records?

The Member: This is your day in court.

Mr. Sandrich: Well, it seems that if we haven't got the records we haven't got a chance to secure the records, and if your Honor won't permit our oral testimony——

The Member: I don't see where you are going to produce oral testimony as to a transaction that was covered by a written contract unless you first make that showing which would entitle you to use secondary evidence. Now, your very statement is that those agreements are about but you haven't seen fit to get them.

Mr. Sandrich: I didn't mean to put it that way, your Honor. I haven't been able to get them. Doesn't that rule apply, your Honor, only in trying to establish the contents of those agreements as such, verbatim, and not the intent and purpose?

The Member: Well, once we have the agreement, if there is some ambiguity about it, or something of that sort, it may be explained, but it is not going to be explained by somebody who is not a party to it. As I understand it, this witness didn't draw those contracts.

Mr. Sandrich: Your Honor, this witness drew a number of the effective contracts and was under the necessity of redrawing a number of the [84] original contracts which have not been properly prepared.

(Testimony of A. P. G. Steffes.)

Mr. Tonjes: That is a conclusion as well, your Honor.

Mr. Sandrich: It is not a conclusion, counsel, because I have in the past seen those contracts. I have discussed them with as many of the parties involved as I could reach and they have all told me that the contracts as amended or as corrected, or what you will, by this witness, did in the end reflect what they originally had in mind.

Mr. Tonjes: That, perhaps, is so, and if the proof of those facts can be adduced, we might have that result, but I want the proof; either counsel's statement or this witness' statement to that effect.

Mr. Sandrich: I will excuse the witness, your Honor.

The Member: Very well. I will give you a five minute recess.

Thereupon a recess was taken for five minutes, at the conclusion of which, the following occurred:

Mr. Steffes: If the Court please, as part of filing my application for admission, it was necessary for me to read the rules, and I wanted to verify my understanding of a certain rule that I read yesterday with reference to the motion for a continuance, so that the record may be clear. I made a motion for a continuance when the two witnesses refused to answer on constitutional grounds and at that time I mentioned my willingness to reduce that motion to writing. Under Rule 20 of the Board they

should be in writing, and I did not clearly understand whether the denial of the motion was made because the motion hadn't previously been placed in writing or whether it was made upon general grounds and that this Member of the Board, in effect, waived the necessity of reducing it to writing.

The Member: That is right. There is no necessity for a motion for a continuance in the midst of a trial to be in writing. [85]

Mr. Steffes: Well, the rule is quite general and by reason of the fact that I am a novice in trying these matters as disclosed, I wasn't sure just what modification to that rule had been made.

The Member: I do not regard the motion as timely or meritorious. There was no satisfactory showing to me that evidence was not available to prove the issues in the case. The case was set a long time ago, set in August, and you were counsel, so you state, for the very witnesses who are refusing to testify. You were fully aware of the whole matter and the motion for a continuance under these circumstances is not timely or meritorious and is denied.

Mr. Steffes: I hesitate——

The Member: You can except to it or not, but I don't want to hear any more about it.

Mr. Steffes: We do except to it, and at the time this matter was first set for hearing on August 26th we were then waiting the brief of the Government in the Internal Revenue matter in Nevada.

And—well, there was another matter that came to my attention that I don't think I should state.

The Member: Mr. Sandrich, you are the chief counsel in this matter. Have you anything further?

Mr. Sandrich: Your Honor, I would like to request at this time that Mr. Steffes be permitted to make such representations to the Court, because of conditions that I don't want to go into too deeply. I feel at this minute inadequate to go into much discussion or argument. In other words, I don't feel very well. I would like to get Mr. Steffes permitted to take over.

The Member: What is it you want him to do?

Mr. Sandrich: I would like to have him permitted to make any representations or other language as he find necessary or desirable to make [86] in addition to what has been said.

The Member: Call any witness that you have, Mr. Steffes. Let us proceed.

Mr. Steffes: I would like to make a showing as the reason for the absence of documentary testimony at this time—well, I would like to make that showing so as to lay the foundation for the production of secondary evidence in lieu of such primary evidence.

The Member: Well, what are you going to do? Go ahead.

Mr. Steffes: In this matter, if the Court please, for a period of approximately 18 months, all of the books and records of the corporation and all of the audit figures, the audit spreads and records of Mr. Sandrich were made to Mr. Crupf of the S.E.C. I

didn't know until about six months after his death—the investigation suddenly stopped and about six months later I found out that he had died. He died about a year ago. By reason of that fact I personally know——

Mr. Tonjes: If your Honor please, I object to the witness' or counsel's statement as not being material to the proceedings here. I am willing to listen to any secondary evidence he has to offer. I thought that was the purpose of your Honor's statement just now, to permit him to offer secondary evidence, and I see no purpose in him making this statement at this time.

Mr. Steffes: Well, the secondary evidence, may I suggest to counsel, for the enlightenment of your Honor, would be my personal knowledge of those documents which I personally prepared and some of which, at least, I personally turned over to Mr. Crupf of the S.E.C., and by reason of which we have been unable to get the original documents or to locate where they are. The situation is this——

The Member: Now, let me ask you something. We are just going along [87] here and taking a lot of time. Do you understand what you have to prove in this proceeding in order to prevail?

Mr. Steffes: Yes, I believe I do.

The Member: All right, now state it to me, what you have to prove.

Mr. Steffes: I believe that we should prove—may I put it this way? The Government has fixed a 10 percent or 10 year life on the personal property which is the subject matter of the depreciation

question now being tried; whereas the petitioner has fixed one-half of the life of that personal property as the proper basis of computation.

The Member: All right, now. As I understand you, counsel, we have already disposed of that part of the case. Now, what about the other part?

Mr. Steffes: No.

The Member: Oh, yes.

Mr. Tonjes: Counsel rested, if your Honor please. That is my recollection.

The Member: Counsel rested on that part of the case. Now, what is the other part that you were going to prove?

Mr. Steffes: Well, I either wasn't listening—because I had a definite discussion with counsel to the effect that the witnesses Maxfield and Wilton would be called upon the conclusion of that particular point and prior to the taking up of the depletion point.

The Member: We are concerned now with the depletion point. Now, what is it that you think you have got to prove?

Mr. Steffes: Well, if the Court and counsel feel and hold at this time that petitioner has rested upon the question of depreciation, I wish to state to the Court that it is not my understanding, and I will verify it with my associate counsel. I understand counsel, although I tried to make myself [88] clear to counsel that we desired to have the matters which I intended to discuss taken up during the depreciation part of the hearing, but he states that they

have rested on that part, and on account of the relative situation between depreciation and depletion, I have no serious objection there. However, do I understand correctly that the witnesses Maxfield and Wilton refused on constitutional grounds to testify during the depreciation part of this hearing?

The Member: Well, didn't you call the witnesses yourself?

Mr. Sandrich: No, your Honor. I called those two.

The Member: Well,——

Mr. Steffes: That may be so.

The Member: Just a minute. To get this in the record, you people there, you and Mr. Sandrich, are acting as a unit in this proceeding. Now, what one does the other is bound by. You are both counsel in one case. Now, he has rested his case and he called the witnesses. It is the same as your calling the witnesses. Now, you can't ask me as to what you called them for.

Mr. Steffes: I would have preferred to have remained out of this proceeding, but I came here as a standby, if I might make this explanation, as I did a year ago, in the Internal Revenue matter because of Mr. Sandrich's condition of health, and I took over on a day's notice, and insofar as the depreciation is concerned, I tried to make myself clear to Mr. Sandrich that the witnesses themselves, not I as their counsel—I was told that I was appearing in this case—that is a personal privilege.

The Member: I understand that. Now, let us get to the point.

Mr. Steffes: The point is this.

The Member: What have you got to prove to prove your second point?

Mr. Steffes: Well, I would like to make this comment, because I [89] feel that here is a misunderstanding, that that refusal to testify or to offer evidence by these two witnesses goes to the question of depreciation as well as the question of depletion, and I make that with all due respect to the Court, having a personal knowledge of the facts upon which that request and motion is made.

The Member: Is that all you have to say?

Mr. Steffes: On that point.

The Member: Well, I might say that you haven't shown to me that you have the slightest misunderstanding of the second point that we are concerned with in this case, which is a question of depletion.

Mr. Steffes: I didn't think we had entered it yet, your Honor. My understanding was that the witnesses were called by Mr. Sandrich on the question of depreciation, and I still feel that my recollection of the record is correct, and that during that portion of the hearing both witnesses and each of them refused to testify on their constitutional grounds. Now, if that has been disposed of, I have no alternative but to proceed with the question of depletion.

The Member: What do you understand you have got to prove? Tell me what you have got to prove.

Mr. Steffes: On which point?

The Member: On the question of depletion.

Mr. Steffes: On the question of depletion, I understand that we have to prove numerous items going into the question, one of which, for instance, is the cost price to the corporation of the mining properties which it acquired.

The Member: The cost price.

Mr. Steffes: That was explained to me during probably a three or four hour session by Mr. Hanson, the engineer who was here yesterday, by [90] Mr. Wells—I subsequently found his name—the auditor, and by Mr. Evans, the special agent of the Internal Revenue Department, who came to my office in Las Vegas to discuss this precise point of depreciation.

The Member: Who is your witness to prove the cost or value? Who have you got here in the court room to prove it?

Mr. Steffes: The witness to prove the cost are the records of the corporation which Mr. Sandrich has here or can produce within probably ten minutes—his office is only a couple of blocks from here—showing the determination, a prior determination of that cost upon two occasions.

The Member: That has nothing to do with this. You are trying a law suit.

Mr. Steffes: Yes, your Honor.

The Member: What is done elsewhere has nothing to do with this. You are trying it right in this court room.

Mr. Steffes: But there is one question as a lawyer, practicing before the District Court, and

I read the rules that this Board follows the rules of the District Court of the District of Columbia, that the doctrine, for instance, of estoppel applies, and I had that particular point raised in the face of opposition and was upheld on that point, and that is our position.

The Member: Have you got anything more?

Mr. Tonjes: I have nothing further, your Honor, no, sir.

The Member: Have you got anything, Mr. Sandrich?

Mr. Sandrich: Nothing, your Honor, except that I am making the offer to bring the rest of my records, my audit records of the Chiquita Mining Company, Limited, and offer them in toto.

The Member: You can't offer records that way, Mr. Sandrich. I [91] think your difficulty, if I can be frank, is you are trying a law suit and you are a C.P.A. Now, there are ways to do these things. Cases are tried here in the same way as in the Federal District Court. They are governed by the rules of evidence. You can't just bring in a lot of documents and put them on the table.

Mr. Sandrich: Your Honor—

The Member: No, I have been pretty patient about this matter, and it seems to me that the time has come to conclude it, because I don't see where you have at all the evidence that is going to help you on the second point.

Mr. Sandrich: These documents that we speak of, your Honor, my files, my working papers cover-

ing that particular period of time do constitute the only existing record of those transactions.

Mr. Tonjes: Well, let the record show that I object to the offer as made, your Honor.

Mr. Steffes: May I cite a precedent established——

The Member: No, I am going to hear Mr. Sandrich, not you.

Mr. Sandrich: Your Honor, isn't it a fact that a C.P.A. having made a detailed audit of a concern, that his evidence and his findings are competent in evidence as to sum totals and a general exposition of the events?

Mr. Tonjes: We have no such problem before the Board. We have no accounting problem involved here.

Mr. Sandrich: We have a question of fact involved, questions which I myself, as the auditor, as a certified public accountant, went into and verified and built up my records therefrom, and it seems to me that those would be competent evidence.

The Member: If I understand your second point, I will explain it to you, as to what I think is the point. Now, the Government has said that you [92] must take the same basis for depletion that the previous owners of these mining claims had.

Mr. Sandrich: When you use the second person, your Honor, do you mean Chiquita Mining Company, Limited, or any corporation or any mining company?

The Member: I mean specifically this company. Now, the law provides that where properties are

transferred to a corporation for stock, and the same control and interest prevails, that then the corporation for depletion and depreciation takes the same basis as the transferor.

Mr. Sandrich: That is correct.

The Member: Now, if you do not fall within that provision, then, of course, where stock is issued the mining company, the successor company would take a basis equal to the fair market value of the property when they got it for the stock, or, in other words, the value of the stock, for the claims. Now, it seems to me the only way this point would have been proven would be to start out with your mining claims.

Mr. Sandrich: That is what I had intended to do, your Honor.

The Member: All right. Show who owned them, show the relative interests of the several people in them, produce the contract whereby these claims were to be transferred to the mining company, produce your stock books and show what stock was issued, show the minutes giving the details of the transaction, and what not, and if that did not bring you within this restricted position, then you would prove your values here as a basis for depreciation, which would have to be a new basis, then, either based on the value of the claims or the cost of the stock, and the only way you could do that is to produce witnesses who know the value as of that time, the fair market value. You can't prove that by an audit you made. [93]

Mr. Sandrich: No, your Honor, but I can prove

by an audit I made the way, the manner in which and the times at which certain quantities of capital stock, as a matter of fact, all of the capital stock, were issued, and my working papers happen to be the first adequate record prepared on those, from my working papers where the entries were copied into the stock ledger and journal. Now, as to valuation, Mr. Maxfield and Mr. Wilton had a very intimate knowledge of that and were parties to the transactions.

The Member: There are plenty of people. I want to know what a building was worth here in Los Angeles ten years ago. It may be that there are people who handled the deal that know, but I may go out and get a real estate man who is an authority. He can testify.

Mr. Sandrich: Well, that——

The Member: I don't care to argue indefinitely with you.

Mr. Sandrich: In that case, your Honor, wouldn't a letter from the Revenue Department in which, after examination, they had decided that those claims were worth a certain amount of money be admissible?

Mr. Tonjes: No.

The Member: It is not admissible in this tribunal. You might get Government counsel to agree with you. That is a different thing. But it has no probative weight otherwise.

Well, we will close the record and I will allow the parties thirty days to file a memorandum in support of their position.

(Hearing concluded.) [94]

Petitioner, Chiquita Mining Company, Ltd., tenders and presents the foregoing as its Statement of Evidence in this case, and prays that the same may be approved by The Tax Court of the United States and made a part of the record in this cause.

MARK J. SANDRICH, C.P.A.

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Los Angeles 14, California

A. P. G. STEFFES

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707 South Hill Street,
Los Angeles 14, California.

Attorneys for Petitioner.

[Endorsed]: T.C.U.S. Filed April 13, 1944. [95]

[Title of Tax Court and Cause.]

STIPULATION AND AGREEMENT TO
STATEMENT OF EVIDENCE

It Is Hereby Stipulated, by and between the parties through their respective counsel, that the foregoing Statement of Evidence constitutes a statement of all the material evidence adduced at the hearing before the above-entitled Court, and the same is approved by the undersigned as attorneys for the Petitioner on Review, and by the undersigned, J. P. Wenchel, Chief Counsel for the Bureau of Internal Revenue, as attorney for the Com-

missioner of Internal Revenue, Respondent on Review.

Dated this 13th day of April, 1944.

A. P. G. STEFFES

1217 Foreman Building
707 South Hill Street,
Los Angeles 14, California
Attorney for Petition on
Review

(s) J. P. WENCHEL

Bureau of Internal Revenue
Attorney for Respondent on
Review

MARK J. SANDRICH, C.P.A.

756 South Broadway,
Los Angeles 14, California
Of Counsel. [96]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of The Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the Petition for Review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by

the above-named Petitioner; and Petitioner hereby designates the same as the record on review therein:

1. Docket entries of the proceedings before the Tax Court of the United States.

2. Amended petition for redetermination.

3. Answer to amended petition for redetermination.

4. Findings of fact and opinion of The Tax Court of the United States.

5. Order of redetermination. [97]

6. Motion to reopen cause, with supporting affidavits.

7. Order denying motion to reopen cause.

8. Petition for review, by the United States Circuit Court of Appeals for the Ninth Circuit.

9. Notice of filing petition for review.

10. Statement of evidence.

11. Orders enlarging time for transmission and delivery of documents.

12. This designation of record.

13. Notice of filing this designation of record, and the admission of service thereof.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

(s) A. P. G. STEFFES

1217 Foreman Building,
707 So. Hill Street,
Los Angeles 14, Calif.
Attorney for Petitioner.

MARK J. SANDRICH, C.P.A.

756 South Broadway,
Los Angeles 14, California.
Of Counsel.

Service of a copy of this designation of record is hereby admitted this 13th day of April, 1944, and agreed to.

(s) J. P. WENCHEL,

C.A.R.

Chief Counsel Bureau of In-
ternal Revenue
Attorney for Respondent

[Endorsed]: T.C.U.S. Filed April 13, 1944. [98]

The Tax Court of the United States
Washington

Docket No. 108263

CHIQUITA MINING COMPANY, LTD.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 98, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 19th day of April, 1944.

B. D. GAMBLE

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 10759. United States Circuit Court of Appeals for the Ninth Circuit. Chiquita Mining Company, Ltd., Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed May 1, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.